SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~ 1965

No. ~~835~~ 48

ANNIE E. HARPER, ET AL., APPELLANTS,

vs.

VIRGINIA STATE BOARD OF ELECTIONS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

Civil Action No. 3253

ANNIE E. HARPER, ET AL., Plaintiffs,

vs.

VIRGINIA STATE BOARD OF ELECTIONS, ET AL., Defendants.

ORDER PERMITTING PLAINTIFFS TO FILE IN FORMA PAUPERIS —March 17, 1964

It is ordered that Annie E. Harper, Gladys A. Berry, Curtis Burr and Myrtle L. Burr be, and they hereby are, permitted to commence and prosecute this action against Virginia State Board of Elections, Electoral Board of Fairfax County, and Waneta M. Buckley, General Registrar of Fairfax County, in forma pauperis, without being required to prepay costs or fees or to give security therefor.

Dated this 17 day of March 1964.

Oren R. Lewis, United States District Judge.

[fol. 2] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

Civil Action No. 3253

ANNIE E. HARPER, Route 1, Box 28, Alexandria (Fairfax County), Virginia, GLADYS A. BERRY, Route 1, Box 30, Alexandria (Fairfax County), Virginia, CURTIS BURR and MYRTLE L. BURR, 840 Quander Road, Alexandria (Fairfax County), Virginia, on behalf of themselves and other similarly situated, Plaintiffs,

vs.

VIRGINIA STATE BOARD OF ELECTIONS, Richmond, Virginia, ELECTORAL BOARD OF FAIRFAX COUNTY, Fairfax, Virginia, WANETA M. BUCKLEY, General Registrar of Fairfax County, Fairfax, Virginia, Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF—Filed March 17, 1964

1. Jurisdiction of this Court is invoked under the Fourteenth Amendment to the United States Constitution, Title 42, United States Code, Section 1983, and Title 28, United States Code, Sections 1343(3), 2201 and 2202.

2. This is a class action brought by plaintiffs, on behalf of themselves and others similarly situated, for the purpose of having declared unconstitutional, and to enjoin enforcement of, the provisions of the Constitution and statutes of Virginia which have the effect of requiring payment of poll taxes as a condition of registering and voting in non-Federal elections in that State; although the constitutional and statutory provisions challenged by plaintiffs, in view of the ratification of the Twenty-fourth Amendment to the United States Constitution, do not apply to elections of Federal

officials, they still apply to State and local elections in Virginia; the provisions in issue are contained in Sections 18, [fol. 3] 20, 21 and 38 of the State Constitution, and Sections 24-17, 24-22, 24-67 and 24-120, Code of Virginia of 1950, as amended.

3. Plaintiffs Annie E. Harper, Gladys A. Berry, Curtis Burr and Myrtle L. Burr are citizens of the United States and residents of Virginia, who desire to register and vote in non-Federal elections in that State, and possess all of the necessary qualifications to do so, except that they lack the financial means to pay necessary poll taxes as required by the aforesaid provisions of the Constitution and statutes of Virginia.

4. Defendant Virginia State Board of Elections is an official governmental body organized under the laws of the Commonwealth of Virginia, which, in the exercise of governmental authority, is responsible for supervising and coordinating the administration and execution of the election laws of that State.

5. Defendant Electoral Board of Fairfax County is an official governmental body organized under the laws of the Commonwealth of Virginia, which in the exercise of governmental authority, is responsible in Fairfax County for supervising and coordinating the administration and execution of the election laws of that State.

6. Defendant Waneta M. Buckley, General Registrar of Fairfax County, is a duly elected or appointed governmental official who, in the exercise of governmental authority, is charged with adherence to, and the enforcement, execution and administration of the election laws of the Commonwealth of Virginia.

7. Plaintiff Annie E. Harper is single; she formerly supported herself principally by doing household or domestic work; at present her sole regular income is derived from Federal social security benefits. Plaintiff Harper, because she has been a resident of Virginia for more than three

years, and has never paid poll taxes is required by the aforesaid provisions of the Constitution and statutes of Virginia to pay three years' back poll taxes, plus a penalty of 5 percent, or a total of $4.74, in order to register and qualify to vote in non-Federal elections in Virginia.

8. Plaintiff Gladys A. Berry is single; she is not gain- [fol. 4] fully employed and has no regular income; she provides day care for seven minor children, two of whom are her own and five of whom are the children of her two married daughters; both daughters are separated from their husbands and do household or domestic work to support themselves, plaintiff Berry, and said seven minor children. Plaintiff Berry, because she has been a resident of Virginia for more than three years, and has never paid poll taxes, is required by the aforesaid provisions of the Constitution and statutes of Virginia to pay three years' back poll taxes, plus a penalty of 5 percent, or a total of $4.74, in order to register and qualify to vote in non-Federal elections in Virginia.

9. Plaintiff Curtis Burr works in the building and construction industry which is characterized by irregular employment because of weather conditions; in calendar 1963 his gross income derived from his employment was less than $5,000; plaintiff Curtis Burr's income is entirely consumed in providing the necessities of life for his wife, plaintiff Myrtle L. Burr, and their nine children. Although plaintiff Curtis Burr paid his poll taxes for 1961 and 1962, he has not paid them for 1963, and does not expect to be able to pay them hereafter because of the low earnings received from his employment and the increasing cost of supporting his family, particularly as his children grow older. The annual poll tax in Virginia is $1.50, plus 5 percent penalty for late payments or a total of $1.58, and in any year, in order for plaintiff Curtis Burr to register and vote in a non-Federal election in Virginia, it will be necessary for him to have paid three years' back poll taxes, plus penalties.

10. Plaintiff Myrtle L. Burr is supported by her husband, plaintiff Curtis Burr, whose annual income of less than $5,000 is entirely consumed in providing the necessities of life for himself, his wife, plaintiff Myrtle L. Burr, and their nine children. Plaintiff Myrtle L. Burr, because she has been a resident of Virginia for more than three years, and has never paid poll taxes, is required by the aforesaid provisions of the Constitution and statutes of Virginia to pay three years' back poll taxes, plus a penalty of 5 percent, or a total of $4.74, in order to register and qualify to vote in non-Federal elections in Virginia.

[fol. 5] 11. Each of the plaintiffs is unable, solely because of his poverty, to pay poll taxes required by Virginia law, and is thereby prevented from registering and voting in non-Federal elections in that State.

12. Plaintiffs are Negroes, and they here represent not only themselves, but other persons as well, both Negro and white, whose lives are characterized by poverty and deprivation to such a degree that they cannot afford to pay money for other than food, clothing, housing, medical care, and other absolute necessities of life; among those included in the class represented by plaintiffs are many unemployed persons, and persons employed in low paying jobs, as well as recipients of public welfare payments, social security benefits, unemployment compensation and retirement pensions, as well as other persons variously referred to as indigents and paupers.

13. Plaintiffs and others in the class described in paragraph 10 hereof are deprived, solely because of their poverty, of the elective franchise in non-Federal elections in Virginia, and they are thereby discriminated against in favor of persons of greater financial resources.

14. The discrimination that Virginia's election laws effect against poverty stricken residents of that State is revealed not only in the poll tax provisions of the State's Constitution and statutes, but also in Section 23 of the State Constitution and Section 24-18, Code of Virginia of 1950, as

amended, which specifically prohibit "paupers" from registering and voting, even if they are otherwise qualified.

15. The provisions of the Constitution and statutes of the State of Virginia specified in paragraph 2 hereof, which have the effect of requiring payment of poll taxes as a condition of registering and voting in Virginia, discriminate against plaintiffs and others similarly situated, depriving them of their rights under the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, and are therefore unconstitutional and void.

[fol. 6] 16. Defendants, by engaging in the enforcement, execution and administration of the provisions of the Constitution and statutes of Virginia specified in paragraph 2 hereof, have deprived and will continue to deprive, unless restrained, plaintiffs and others similarly situated of their rights under the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

17. The damage and injury done to plaintiffs by reason of their being deprived of the foregoing rights is continuing and irreparable, and there is no adequate remedy at law.

WHEREFORE, plaintiffs pray that this Court:

A. Convene a statutory court of three judges pursuant to Title 28, United States Code, Section 2284, for the purpose of hearing and determining this cause.

B. Adjudge and declare to be in violation of the Constitution of the United States, and therefore void, all provisions of the Constitution and statutes of Virginia which have the effect of requiring payment of poll taxes as a condition of registering and voting in elections in that State.

C. Issue a preliminary and a permanent injunction

(1) Restraining and preventing defendants, their agents, servants, and employees and all other persons in active

concert with them who receive actual notice of the order of the Court by personal service or otherwise from enforcing, executing, administering, or in any manner giving effect to, the provisions of the Constitution and statutes of Virginia which have the effect of requiring payment of poll taxes a condition of registering and voting in elections in that State.

(2) Directing defendant Virginia State Board of Elections (a) to notify those governmental officials and governmental boards and bodies of the Commonwealth of Virginia, the activities of which said defendant is authorized by law to supervise, direct, or coordinate, that the provisions of the Constitution and statutes of Virginia which have the effect of requiring payment of poll taxes as a condition of registering and voting in elections in that State are unconstitutional and void, and (b) to instruct [fol. 7] said governmental officials and governmental boards and bodies to cease enforcing, executing, administering or in any manner giving effect to, the provisions of the Constitution and statutes of Virginia which have the effect of requiring payment of poll taxes as a condition of registering and voting in elections in that State.

D. Grant plaintiffs such other and further relief as may be just and equitable in the premises.

Philip Schwartz

Lawrence Speiser, c/o American Civil Liberties Union and National Capital Area Civil Liberties Union, Suite 803, 1101 Vermont Avenue, Washington 5, D. C.;

Allison W. Brown, Jr., Suite 705, 1000 Connecticut Avenue, Washington 6, D. C.;

Philip Schwartz, 2054 14th Street, North, Arlington, Virginia; Attorneys for Plaintiffs.

Commonwealth of Virginia,
County of Fairfax, ss.:

Annie E. Harper, being duly sworn, deposes and says that she resides at Route 1, Box 28, Alexandria (Fairfax County), Virginia; that she has read the foregoing complaint and knows the contents thereof and that the same are true to her knowledge except as to the matters therein imparted to her by others, and as to those matters she believes them to be true.

Annie E. Harper

Subscribed and sworn to before me this 14th day of March, 1964.

Wells A. Proctor, Notary Public. My Commission Expires April 1, 1967.

[fol. 8]

Commonwealth of Virginia,
County of Fairfax, ss.:

Gladys A. Berry, being duly sworn, deposes and says that she resides at Route 1, Box 30, Alexandria (Fairfax County), Virginia; that she has read the foregoing complaint and knows the contents thereof and that the same are true to her knowledge except as to the matters therein imparted to her by others, and as to those matters she believes them to be true.

Gladys A. Berry

Subscribed and sworn to before me this 14th day of March, 1964.

Wells A. Proctor, Notary Public. My Commission Expires April 1, 1967.

Commonwealth of Virginia,
County of Fairfax, ss.:

Curtis Burr, being duly sworn, deposes and says that he resides at 840 Quander Road, Alexandria (Fairfax County),

Virginia; that he has read the foregoing complaint and knows the contents thereof and that the same are true to his knowledge except as to the matters therein imparted to him by others, and as to those matters he believes them to be true.

Curtis Burr

Subscribed and sworn to before me this 14th day of March, 1964.

Wells A. Proctor, Notary Public. My Commission Expires April 1, 1967.

[fol. 9]

Commonwealth of Virginia,
County of Fairfax, ss.:

Myrtle L. Burr, being duly sworn, deposes and says that she resides at 840 Quander Road, Alexandria (Fairfax County), Virginia; that she has read the foregoing complaint and knows the contents thereof and that the same are true to her knowledge except as to the matters therein imparted to her by others, and as to those matters she believes them to be true.

Myrtle L. Burr

Subscribed and sworn to before me this 14th day of March, 1964.

Wells A. Proctor, Notary Public. My Commission Expires April 1, 1967.

[fol. 10] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

Civil Action No. 3253

IN THE MATTER OF THE APPLICATION OF GLADYS A. BERRY FOR LEAVE TO SUE IN FORMA PAUPERIS—Filed March 17, 1964

United States of America,
Eastern District of Virginia,
County of Fairfax, ss.:

Gladys A. Berry, being duly sworn, deposes and says: I am entitled to and intend to commence a civil action in this Court against Virginia State Board of Elections, Electoral Board of Fairfax County and Waneta M. Buckley, General Registrar of Fairfax County. The nature of said action is to have declared unconstitutional, and to enjoin enforcement of, the provisions of the Constitution and statutes of Virginia which have the effect of requiring payment of poll taxes as a condition of registering and voting in non-Federal elections in that State. I believe that I am entitled to the redress sought in said action because, as more fully shown by the complaint filed herewith, the Constitution and statutes of Virginia, which deny to persons otherwise fully qualified the right to vote because they do not have the economic means to pay the poll tax, violate the United States Constitution. Because of my poverty, I am unable to pay the costs of said action or to give security therefor and to provide myself with the necessities of life.

Wherefore, affiant prays that she may have leave to prosecute said action in forma pauperis, pursuant to Title 28, United States Code, Section 1915.

Gladys A. Berry

Subscribed and sworn to before me this 14th day of March, 1964.

Wells A. Proctor, Notary Public. My Commission Expires April 1, 1967.

[fol. 11] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

Civil Action No. 3253

IN THE MATTER OF THE APPLICATION OF CURTIS BURR FOR LEAVE TO SUE IN FORMA PAUPERIS—Filed March 17, 1964

United States of America,
Eastern District of Virginia,
County of Fairfax, ss.:

Curtis Burr, being duly sworn, deposes and says: I am entitled to and intend to commence a civil action in this Court against Virginia State Board of Elections, Electoral Board of Fairfax County and Waneta M. Buckley, General Registrar of Fairfax County. The nature of said action is to have declared unconstitutional, and to enjoin enforcement of, the provisions of the Constitution and statutes of Virginia which have the effect of requiring payment of poll taxes as a condition of registering and voting in non-Federal elections in that State. I believe that I am entitled to the redress sought in said action because, as more fully shown by the complaint filed herewith, the Constitution and statutes of Virginia, which deny to persons otherwise fully qualified the right to vote because they do not have the economic means to pay the poll tax, violate the United States Constitution. Because of my poverty, I am unable to pay the costs of said action or to give security therefor and to provide myself with the necessities of life.

Wherefore, affiant prays that he may have leave to prosecute said action in forma pauperis, pursuant to Title 28, United States Code, Section 1915.

CURTIS BURR

Subscribed and sworn to before me this 14th day of March, 1964.

Wells A. Proctor, Notary Public. My Commission Expires April 1, 1967.

[fol. 12] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

Civil Action No. 3253

IN THE MATTER OF THE APPLICATION OF MYRTLE L. BURR FOR LEAVE TO SUE IN FORMA PAUPERIS—Filed March 17, 1964

United States of America,
Eastern District of Virginia,
County of Fairfax, ss.:

Myrtle L. Burr, being duly sworn, deposes and says: I am entitled to and intend to commence a civil action in this Court against Virginia State Board of Elections, Electoral Board of Fairfax County and Waneta M. Buckley, General Registrar of Fairfax County. The nature of said action is to have declared unconstitutional, and to enjoin enforcement of, the provisions of the Constitution and statutes of Virginia which have the effect of requiring payment of poll taxes as a condition of registering and voting in non-Federal elections in that State. I believe that I am entitled to the redress sought in said action because, as more fully shown by the complaint filed herewith, the Constitution and statutes of Virginia, which deny to persons otherwise fully

qualified the right to vote because they do not have the economic means to pay the poll tax, violate the United States Constitution. Because of my poverty, I am unable to pay the costs of said action or to give security therefor and to provide myself with the necessities of life.

Wherefore, affiant prays that she may have leave to prosecute said action in forma pauperis, pursuant to Title 28, United States Code, Section 1915.

MYRTLE L. BURR

Subscribed and sworn to before me this 14th day of March, 1964.

Wells A. Proctor, Notary Public. My Commission Expires April 1, 1967.

[fol. 13] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

Civil Action No. 3253

IN THE MATTER OF THE APPLICATION OF ANNIE E. HARPER FOR LEAVE TO SUE IN FORMA PAUPERIS—Filed March 17, 1964

United States of America,
Eastern District of Virginia,
County of Fairfax, ss.:

Annie E. Harper, being duly sworn, deposes and says: I am entitled to and intend to commence a civil action in this Court against Virginia State Board of Elections, Electoral Board of Fairfax County and Waneta M. Buckley, General Registrar of Fairfax County. The nature of said action is to have declared unconstitutional, and to enjoin enforcement of, the provisions of the Constitution and statutes of Virginia which have the effect of requiring payment of

poll taxes as a condition of registering and voting in non-Federal elections in that State. I believe that I am entitled to the redress sought in said action because, as more fully shown by the complaint filed herewith, the Constitution and statutes of Virginia, which deny to persons otherwise fully qualified the right to vote because they do not have the economic means to pay the poll tax, violate the United States Constitution. Because of my poverty, I am unable to pay the costs of said action or to give security therefor and to provide myself with the necessities of life.

Wherefore, affiant prays that she may have leave to prosecute said action in forma pauperis, pursuant to Title 28, United States Code, Section 1915.

ANNIE E. HARPER

Subscribed and sworn to before me this 14th day of March, 1964.

Wells A. Proctor, Notary Public. My Commission Expires April 1, 1967.

[fol. 18] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

AT ALEXANDRIA

Civil Action No. 3253

[Title omitted]

PRE-TRIAL ORDER—April 2, 1964

The defendants herein are directed to file their respective answers, if not already filed, together with such additional pleadings as they deem proper, on or before April 20, 1964.

The taking of pre-trial depositions, the filing of interrogatories, requests for admissions, and other pre-trial procedures should be concluded on or before June 1, 1964. No

additional motions, other pleadings or further pre-trial procedures may be filed or indulged in after June 1, 1964, except by leave of Court for good cause shown.

All proposed exhibits and names and addresses of all witnesses who may be called to testify should be filed with the Clerk of this Court (in Alexandria) on or before July 1, 1964. If the exhibits are voluminous, they should be marked by the Clerk at least two days prior to the date of trial. Formal proof of exhibits will be deemed waived un-
[fol. 19] less objected to in writing seven days prior to the date of trial. Copies of all exhibits, lists of witnesses and briefs should be mailed to all parties of record and the members of the Three-Judge Court at their respective addresses.

Hearing on all motions, unless otherwise ordered by the Court, will be deferred until the date of the hearing on the merits.

Plaintiffs' briefs should be filed on or before August 1, 1964. Defendants' briefs should be filed on or before September 1, 1964. Plaintiffs' reply brief, if any, should be filed on or before September 10, 1964.

The date for the hearing of this case upon the merits will be deferred until after another Three-Judge Court of this District renders its decision in similar cases now pending before it, at which time the Court will fix the date for the hearing of the above-styled matter.

The Clerk will forthwith mail copies of this pre-trial order to all counsel of record.

At Alexandria
April 2, 1964

/s/ Oren R. Lewis
United States District Judge

[fol. 22] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

Civil Action No. 3253

[Title omitted]

ANSWER—Filed April 9, 1964

In answer to the complaint filed herein against the Electoral Board of Fairfax County, Virginia, Waneta M. Buckley, General Registrar of Fairfax County and others, the Defendants said Electoral Board and Waneta M. Buckley, respectively, by their counsel, state as follows:

1. That the Electoral Board of Fairfax County and Waneta M. Buckley, General Registrar of Fairfax County, adopt as their answer and defense to the complaint and other pleadings, present and future, filed herein, any and all answers and defensive pleadings, present and future, filed and to be filed by the Attorney General of the Commonwealth of Virginia for and on behalf of the Board of Elections of the Commonwealth of Virginia.

And having thus fully answered, they pray to be thus dismissed with cost to Plaintiff.

Electoral Board of Fairfax County, Waneta M. Buckley, General Registrar, Fairfax County, Virginia, By Donald C. Crounse, Counsel.

Ralph G. Louk, Commonwealth's Attorney, Fairfax County, Virginia, Counsel for Defendant.

Donald C. Crounse, Ass't Commonwealth's Attorney, Fairfax County, Virginia, Counsel for Defendant.

[fol. 23] Certificate of Service (omitted in printing).

[fol. 24] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
At Alexandria
Civil Action No. 3253
[Title omitted]

MOTION TO DISMISS—Filed April 13, 1964

Now comes the defendant, the Virginia State Board of Elections, by counsel, and moves the Court to dismiss this action for the following reasons:

1. The Treasurer of Fairfax County, Virginia and the Clerk of the Circuit Court of Fairfax County, Virginia are charged by the Constitution and laws of Virginia with certain duties in the administration and conduct of elections and, therefore, are indispensable parties not within the jurisdiction of this Court and without whom the relief prayed for in the Complaint cannot be granted;

2. The complainants lack the capacity and standing to bring this suit;

3. The Court lacks jurisdiction over the persons and over the subject matter;

[fol. 25] 4. The complaint fails to state a claim upon which relief can be granted.

This Motion is based upon the pleadings and exhibits on file and to be filed in this action and the authorities attached hereto.

Virginia State Board of Elections, By: Richard N. Harris, Counsel.

Robert Y. Button, Attorney General of Virginia, Supreme Court—State Library Building, Richmond, Virginia 23219.

Richard N. Harris, Assistant Attorney General, Supreme Court—State Library Building, Richmond, Virginia 23219.

Certificate of Service (omitted in printing).

[fol. 26]

ATTACHMENT TO MOTION TO DISMISS

Authorities Relied upon in Support of this Motion:

CONSTITUTIONAL PROVISIONS:

Constitution of Virginia, Sections 23, 38, 173

STATUTORY PROVISIONS:

Title 24, Code of Virginia, 1950, as amended

TEXTS:

Barron and Holtzoff on *Federal Practice and Procedure*, Volume 2, Sections 514 and 515

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 12

CASES:

Jeffers v. *Whitley*, 165 F. Supp. 951 (M.D. N.C. 1958)
Covington v. *Edwards*, 264 F. 2d 780 (4th Cir. 1959)
Opinion of the Justices to the Senate, 28 Mass. 538, 11 Pick. 538 (1832)
Opinion of the Justices to the House, 7 Me. 497 (1831)
Alleghany County v. *City of Pittsburgh*, 281 Pa. 300, 127 A. 724 (1924)
Estate of Hoffen, 70 Wis. 522, 36 N.W. 407 (1888)
Lee County v. *Lackie*, 30 Ark. 764 (1875)
Hutchings v. *Thompson*, 10 Cush. 238 (Mass. 1852)

Breedlove v. *Suttles*, 302 U.S. 277, 58 S. Ct. 205, 82 L. Ed. 252 (1937)

Butler v. *Thompson*, 97 F. Supp. 17 (E.D. Va. 1951), aff'md *per curiam* 341 U.S. 937, 71 S. Ct. 1002, 95 L. Ed. 919

[fol. 27] *Saunders* v. *Wilkins*, 152 F. 2d 235 (4th Cir. 1945), cert. den. 328 U.S. 870, 66 S. Ct. 1362, 90 L. Ed. 1640

Pirtle v. *Brown*, 118 F. 2d 218 (6th Cir. 1941), cert. den. 314 U.S. 621, 62 S. Ct. 64, 86 L. Ed. 499

Wheeler v. *State*, 219 Miss. 129, 63 So. 2d 517 (1953), app. dism'd. and cert. den. 346 U.S. 852, 74 S. Ct. 67, 98 L. Ed. 367, reh. den. 346 U.S. 905, 74 S. Ct. 216, 98 L. Ed. 404

Thomas v. *Chamberlain*, 143 F. Supp. 671 (E. D. Tenn. 1955), affm'd. *per curiam* 236 F. 2d 417

Hewitt v. *City of Jacksonville*, 188 F. 2d 423 (5th Cir. 1951), cert. den. 342 U.S. 835, 72 S. Ct. 58, 96 L. Ed. 631

[fol. 28] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

AT ALEXANDRIA

Civil Action No. 3253

[Title omitted]

ANSWER OF THE DEFENDANT, VIRGINIA STATE BOARD OF ELECTIONS—Filed April 20, 1964

First Defense

The complaint fails to state a claim against this defendant upon which relief can be granted.

Second Defense

The plaintiffs have no right to bring this suit *in forma pauperis.*

Third Defense

In the alternative, this defendant alleges and avers that the plaintiffs lack the capacity and standing to bring this suit.

Fourth Defense

This Court lacks jurisdiction over the persons and over the subject matter of this action.

[fol. 29] Fifth Defense

1. This defendant denies that this Court has jurisdiction under any of the articles, sections, amendments, titles or code sections cited in paragraph (1) of the complaint.

2. This defendant admits that Amendment XXIV of the United States Constitution applies only to federal elections and not to State elections, but denies that the provisions of the Constitution of Virginia and of the Code of Virginia cited by the plaintiff in paragraph (2) apply only to state and local elections and not to elections of Federal officials. This defendant avers that only in so far as these provisions of the Constitution and Code of Virginia have been affected by Amendment XXIV of the United States Constitution do they not apply to Federal elections. Further, this defendant avers that the provisions of the Constitution and Code of Virginia speak for themselves. It is averred that the remainder of paragraph (2) does not require an answer.

3. This defendant is without information sufficient to form a belief as to the truth or falsity of the averments of paragraph (3) of the complaint.

4. This defendant admits the averments of paragraphs (4), (5) and (6) of the complaint.

5. This defendant is without information sufficient to form a belief as to the truth or falsity of the averments in paragraphs (7), (8), (9) and (10) of the complaint, and avers that the Constitution and laws of Virginia speak for themselves relative to registration and qualification for voting in this State.

[fol. 30] 6. This defendant is without information sufficient to form a belief as to the truth or falsity of the averments in paragraphs (11) and (12) of the complaint.

7. This defendant denies the averments of paragraphs (13), (14), (15), (16) and (17) of the complaint.

Wherefore, said defendant demands that this Court refuse to grant any of the prayers of the plaintiffs and further demand that this action against it be dismissed with costs herein incurred paid by the plaintiffs.

Virginia State Board of Elections, By: Richard N. Harris, Counsel.

Robert Y. Button, Attorney General of Virginia, Supreme Court—State Library Building, Richmond, Virginia 23219.

Richard N. Harris, Assistant Attorney General, Supreme Court—State Library Building, Richmond, Virginia 23219.

Certificate of Service (omitted in printing).

[fol. 31] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION
Civil Action No. 3253

[Title omitted]

MOTION FOR LEAVE TO AMEND COMPLAINT—
Filed May 26, 1964

Plaintiffs move the Court for leave to amend their complaint on file herein in the following particulars:

1. Adding a Subparagraph (a) to Paragraph 2 to read as follows:

> (a) Plaintiffs further seek to have declared unconstitutional, and to enjoin enforcement of, Section 23 of the Constitution of Virginia and Section 24-18 of the Code of Virginia of 1950, as amended, insofar as they specify "paupers" among the classes of persons disqualified from registering and voting in Virginia.

2. Adding to Paragraph 15, between the second clause of the sentence and the comma immediately following it, the following: "and which prohibit 'paupers' from registering and voting."

3. Adding to Paragraphs B, C(1), C(2)(a) and C(2)(b) of the Prayer, by inserting after the word "voting" where it appears in each of said paragraphs, the following: ", and which prohibit 'paupers' from registering and voting,".

[fol. 32] The grounds of this motion are that justice so requires, and in order that the important constitutional issue involved in this proceeding be fully litigated.

Philip Schwartz, Esquire.

Lawrence Speiser, Esquire, c/o American Civil Liberties Union & National Capital Area Civil Liberties Union, Suite 803, 1101 Vermont Avenue, Washington 5, D. C.

Allison W. Brown, Jr., Esquire, Suite 705, 1000 Connecticut Avenue, Washington 6, D. C.

Philip Schwartz, Esquire, 2054 14th Street, North, Arlington, Virginia.

Certificate of Service (omitted in printing).

[fol. 38] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

AT ALEXANDRIA

Civil Action No. 3253

Alexandria Division

ANNIE E. HARPER, et al., Plaintiffs,

v.

VIRGINIA STATE BOARD OF ELECTIONS, et al., Defendants.

Civil Action No. 4658

Norfolk Division

MRS. EVELYN BUTTS, Plaintiff,

v.

ALBERTIS HARRISON, Governor, et al., Defendants.

ORDER GRANTING MOTION TO AMEND COMPLAINT AND ALSO SETTING DATE FOR HEARING ON THE MERITS, ETC.—June 9, 1964

It is Adjudged and Ordered that the motion of Annie E. Harper, et al., to amend their complaint in the manner

set forth in the motion filed May 26, 1964 is granted. The defendants may adopt as responsive pleadings to the amended complaint the pleadings that they have already filed. If they desire to file additional responsive pleadings to the amended complaint they may do so on or before July 10, 1964.

[fol. 39] It is Ordered that these cases are set for hearing upon the merits and upon all motions, including motions for summary judgment, on October 21, 1964 at 10:00 o'clock A.M., D.S.T., in the United States Courthouse, Alexandria, Virginia.

Let the Clerk mail copies of this order to all counsel of record.

John D. Butzner, Jr., United States District Judge.

June 9, 1964

[fol. 40] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT ALEXANDRIA
Civil Action No. 3253

[Title omitted]

ANSWER OF THE DEFENDANT, VIRGINIA STATE BOARD OF ELECTIONS, TO THE AMENDED COMPLAINT—Filed June 29, 1964

Comes now the defendant, Virginia State Board of Elections, by counsel, and adopts as its responsive pleadings to the Amended Complaint the Motion to Dismiss and the Answer it has already filed, amending, however, the Fifth Defense, paragraph 2, of the Answer to read as follows:

Fifth Defense

2. This defendant admits that Amendment XXIV of the United States Constitution applies only to Federal elections and not to State elections, but denies that the provisions of the Constitution of Virginia and of the Code of Virginia cited by the plaintiff in paragraph 2 apply only to state and local elections and not to elections of Federal officials. This defendant avers that only in so far as these provisions of the Constitution and Code of Virginia have been affected by Amendment XXIV of the United States [fol. 41] Constitution do they not apply to Federal elections. Further, this defendant avers that the provisions of the Constitution and Code of Virginia cited by the plaintiff speak for themselves and are valid, constitutional and enforceable. It is averred that the remainder of paragraph 2 does not require an answer.

Virginia State Board of Elections, By: Richard N. Harris, Counsel.

Robert Y. Button, Attorney General of Virginia, Supreme Court—State Library Building, Richmond, Virginia 23219.

Richard N. Harris, Assistant Attorney General, Supreme Court—State Library Building, Richmond, Virginia 23219.

Certificate of Service (omitted in printing).

[fol. 57]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION
Civil Action No. 3253

ANNIE E. HARPER, et al., Plaintiffs,

v.

VIRGINIA STATE BOARD OF ELECTIONS, et al., Defendants.

Civil Action No. 3346

MRS. EVELYN BUTTS, Plaintiff,

v.

ALBERTIS HARRISON, Governor, et al., Defendants.

Courtroom No. 1,
U. S. Post Office
and Courthouse
Alexandria, Virginia

Transcript of Hearing—October 21, 1964

Met, pursuant to notice, at 10:00 o'clock a. m.

Before: Honorable Albert V. Bryan, Circuit Judge, Honorable Oren R. Lewis, District Judge, Honorable John D. Butzner, Jr., District Judge.

[fol. 58] APPEARANCES:

J. A. Jordan, Jr., Norfolk, Virginia, Len W. Holt, Washington, D. C., and Max Dean and Robert L. Segar, both of

Flint, Michigan, counsel for plaintiffs in No. 3346; and Ira M. Lechner and Allison W. Brown, Jr., both of Washington, D. C., and Philip Schwartz, Arlington County, Virginia, counsel for plaintiffs in No. 3253.

Robert Y. Button, Attorney General of Virginia, and Richard N. Harris, Assistant Attorney General of Virginia, both of Richmond, Virginia, counsel for defendants Virginia State Board of Elections in No. 3253 and counsel for Albertis Harrison, Governor, in No. 3346, Donald C. Crounse, Assistant Commonwealth's Attorney, Fairfax County, Virginia, counsel for Electoral Board of Fairfax County and Waneta M. Buckley, General Registrar of Fairfax County, Virginia, in No. 3253, Alfred W. Whitehurst, Commonwealth's Attorney, City of Norfolk, Norfolk, Virginia, counsel for Mary Dudley, City Registrar, City of Norfolk, Alex H. Bell, City Treasurer, City of Norfolk, and William Prieur, Clerk, The Corporation Court, City of Norfolk, all of Norfolk, Virginia, in No. 3346.

[fol. 59]

ORAL ARGUMENT IN BEHALF OF THE DEFENDANTS BY RICHARD N. HARRIS, ESQUIRE, ASSISTANT ATTORNEY GENERAL

Mr. Harris:

* * * * * * *

[fol. 62] Now, with reference to the complaints themselves, in the Harper complaint we find this paragraph:

"Plaintiffs are Negroes, and they here represent not only themselves, but other persons as well, both Negro and white, whose lives are characterized by poverty and deprivation to such a degree that they cannot afford to pay money for other than food, clothing, housing, medical care, and other absolute necessities of life; among those included in the class represented by plaintiffs are many unemployed persons, and persons employed in low paying jobs, as well as recipients of public welfare payments, social secuity benefits, unemployment compensation and retirement pensions, as well as other persons variously referred to as indigents and paupers."

If that isn't an allegation under oath of somebody being poor, I don't know what it is, and to my definition, in my definition, "poor" is being a pauper, as that word is used in Section—

[fol. 63] Judge Butzner: Do you mean every poor person is excluded from voting and could be challenged in Virginia?

Mr. Harris: Yes, sir. I believe exactly what Section 23 of the Constitution says.

Judge Butzner: And that the regular procedures for challenging are available for that.

Mr. Harris: Yes, sir.

• • • • • • •

[fol. 64] Judge Lewis: He can challenge him. Can he do it successfully, in your opinion?

Mr. Harris: That is what I was getting ready to comment on. The word "pauper", the definition of the word "pauper" is what we are dealing with here. What does the word "pauper" mean as it is used in the Virginia Constitution? Now, your question would have to be answered in that sense, what is a pauper as that word is used, and, in my brief, I attempt to show in what sense I think the word "pauper" has, as used and is being used in the Virginia Constitution.

Now, again, these gentlemen have used the Federal figure of what a pauper is, at least some of them have. The other side seems to disagree because they make allegation that their plaintiffs earn more than the $3,000 that President Johnson seems to think is the median figure. But you are dealing here with the definition of the word "pauper" in the Virginia Constitution, and I would have to answer Judge Lewis' question and Judge Butzner's question in terms of what does that word mean. You can challenge it, but the question is, who is the pauper after you make the challenge and how do you establish just what a pauper is. We are dealing here with a pauper in the sense of the use of that word in Section 23.

• • • • • • •

[fol. 65] Now, I am saying, and my position really is, that just using the common sense definition of the word "pauper", somebody who doesn't own anything, these people have come in here and told you gentlemen that they do not own anything, that they own so little they can't afford to pay $1.50.

Judge Bryan: That is preliminary to my main concern, that is, the historical meaning of this "pauper". But how can you say, Mr. Harris, that he pleads himself out of court by pleading himself to be a pauper? Couldn't he still attack it, even if he were conceded to be a pauper?

Mr. Harris: How can you have standing to attack a poll tax and say that it, as a prerequisite to voting, denies me a Constitutional right when you are excluded from voting even if you can afford, even if everything you say is true? In other words, even if he wins, he can't vote.

Judge Bryan: You are addressing that argument to the poll tax part of this case—

Mr. Harris: That is right.

Judge Bryan: —and not to the pauper part.

Mr. Harris: That is right. Obviously, I am addressing it to their right to challenge the poll tax.

[fol. 66] Judge Bryan: The poll tax, but not the right to challenge the pauper position.

Mr. Harris: That is quite correct. * * * But, I am directing my remarks now solely and only to their right to challenge the poll tax, saying that even if they are successful in getting the poll tax declared unconstitutional, then they still would not be able to vote because they are paupers. Then, for that reason, they cannot possibly be plaintiffs who can achieve the result they want, and, therefore, they have no standing here. They are not persons who are qualified to vote in the first place, poll tax or no poll tax.

Judge Lewis: You do not think any court would construe everybody in the class referred to in this suit that is questioning the poll tax provision would be in the category of paupers as referred to in the Virginia Constitution, do you?

Mr. Harris: I am merely, sir, relying upon the allegations of the plaintiffs themselves in their complaint, which

is all I can do on a motion to dismiss. I have to rely on what they themselves say about themselves.

* * * * * * *

[fol. 68] Judge Butzner: Now, Mrs. Butts alleges, as you quote on page 15 of your brief, "Plaintiff is an adult Negro citizen of small financial means barely adequate to provide for the necessities of living." Now, that is describing her.

Mr. Harris: Yes, sir.

Judge Butzner: That, in your opinion, is a pauper; accepting all of that as true,—

Mr. Harris: Yes, sir.

Judge Butzner: —you say a person who meets that description cannot legally vote in Virginia?

Mr. Harris: Coupled with the affidavit in forma pauperis, yes, sir.

* * * * * * *

[fol. 69] Judge Bryan: The up-shot of your argument would be, as far as pauper, as opposed to the pauper provision is concerned—

Mr. Harris: Right.

Judge Bryan: —is that the plaintiff here has not brought [fol. 70] himself within the real, which is the historical, meaning of "pauper", and, therefore, is not in a position to attack that.

Mr. Harris: No, sir, my position is not that. My position is that the plaintiffs here are not in a position to attack the poll tax as being unconstitutional because they are excluded from voting because they are paupers.

* * * * * * *

[fol. 71] Judge Bryan: All right, sir.

Mr. Button, is there anything you want to say, sir?

Mr. Button: No, sir.

* * * * * * *

[fol. 72] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT ALEXANDRIA
Civil Action No. 3253

ANNIE E. HARPER, et al., Plaintiffs,

v.

VIRGINIA STATE BOARD OF ELECTIONS, et al., Defendants.

Civil Action No. 3346

MRS. EVELYN BUTTS, Plaintiff,

v.

ALBERTIS HARRISON, Governor, et al., Defendants.

(Argued October 21, 1964 Decided November 10, 1964.)

Before Bryan, Circuit Judge, and Lewis and Butzner, District Judges.

J. A. Jordan, Jr., Norfolk, Virginia, Len W. Holt, Washington, D. C., and Max Dean and Robert L. Segar, both of Flint, Michigan, counsel for plaintiffs in No. 3346; and Ira M. Lechner and Allison W. Brown, Jr., both of Washington, D. C. and Philip Schwartz, Arlington County, Virginia, counsel for plaintiffs in No. 3253.

Robert Y. Button, Attorney General of Virginia and Richard N. Harris, Assistant Attorney General of Virginia, both of Richmond, Virginia, counsel for defendants Virginia State Board of Elections in No. 3253 and counsel for Albertis Harrison, Governor, in No. 3346; Donald C. Crounse,

Assistant Commonwealth's Attorney, Fairfax County, Virginia, counsel for Electoral Board of Fairfax County and Waneta M. Buckley, General Registrar of Fairfax County, Virginia in No. 3253; Alfred W. Whitehurst, Commonwealth's Attorney, City of Norfolk, Norfolk, Virginia, counsel for Mary Dudley, City Registrar, City of Norfolk, Alex H. Bell, City Treasurer, City of Norfolk, and William Prieur, Clerk, the Corporation Court, City of Norfolk, all of Norfolk, Virginia in No. 3346.

[fol. 73]

OPINION PER CURIAM—November 10, 1964

Poll tax payment as a prerequisite to voting in State and local elections, exacted by the Constitution and statutes of Virginia,[1] is attacked in these two consolidated actions as violative of the no-abridgement and equal protection commands of the Federal Fourteenth Amendment. A corollary attack is made upon the provision of the State constitution excluding "paupers" as persons entitled to vote in any election.[2]

The common premise of the assaults is: that the plaintiffs are financially unable to pay the tax—$1.50 for each of the 3 preceding years for which the elector was assessable; and that they and other State citizens similarly impecunious are thereby deprived, solely on account of their poverty, of the privilege to vote, and at the same time they are also denied a privilege accorded other citizens not so poor.

Notwithstanding the plaintiffs' impoverishment and eligibility to vote, their denunciation of the State constitutional and statutory poll tax requirements has been squarely re-

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[1] Va. Constitution §§ 18, 20, 21 and 38; 1950 Code of Va. as amended §§ 24-17, 24-22, 24-67, and 24-120. The separation by race or color, as required in § 38 of the Va. constitution and § 24-120 of the Code of Virginia, in the listing of persons who have paid the poll taxes was declared invalid by this court in Hamm v. Virginia State Board of Elections, 230 F.Supp. 156, aff'd October 26, 1964, —— U.S. ——.

[2] Va. Constitution § 23; 1950 Code of Va. § 24-18, as amended.

futed by the Supreme Court in Breedlove v. Suttles, 302 U.S. 277, 283 (1937). We are not at liberty to deviate from that precept. There the Court considered arguments [fol. 74] akin to those of the plaintiffs here, including the economic factor, and rejected them. This court adhered to that precedent in Butler v. Thompson, 97 F. Supp. 17, 22 (1951), aff'd per curiam 341 U.S. 937. In this it adverted to the like holding of this Circuit in Saunders v. Wilkins, 152 F.2d 235, 237 (1945), cert. denied 328 U.S. 870, rehearing denied 329 U.S. 824, an appeal touching the Virginia constitutional and statutory clauses now questioned. The tax is levied upon every adult resident irrespective of his intent to vote.[3] Moreover, no racial discrimination is exhibited in its application as a condition to voting. Cf. Butler v. Thompson, *supra*, 97 F. Supp. 17, 21.

Adequate answer to the attack upon the exclusion of paupers is that this disqualification—apparently of early historical origin and prevalent in several States—has not been employed to prevent the plaintiffs or their class from voting. Plaintiffs do not essay a showing that they, or anyone else in destitute circumstances, have been designated "paupers" in the sense of the Virginia constitution. Therefore, an expression by us upon the meaning and implications of that term would be entirely academic and without place here.

The complaint in each of these cases will be dismissed.

Dismissed.

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[3] Va. Constitution § 173; Code of Va. § 58-49.

[fol. 75] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT ALEXANDRIA

Civil Action No. 3253

ANNIE E. HARPER, et al., Plaintiffs,

v.

VIRGINIA STATE BOARD OF ELECTIONS, et al., Defendants.

Civil Action No. 3346

MRS. EVELYN BUTTS, Plaintiff,

v.

ALBERTIS HARRISON, Governor, et al., Defendants.

FINAL ORDER—November 10, 1964

Upon consideration of the pleadings, the exhibits, the stipulations and other parts of the record in these cases, as well as the briefs and oral arguments of counsel, for reasons stated in the Court's written opinion this day filed, it is

Ordered that each of the said complaints be, and it is hereby, dismissed.

Albert V. Bryan, United States Circuit Judge, Oren R. Lewis, United States District Judge, John D. Butzner, Jr., United States District Judge.

November 10, 1964

[fol. 76] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION
Civil Action No. 3253

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed December 4, 1964

I. Notice is hereby given that Annie E. Harper, Gladys A. Berry, Curtis Burr and Myrtle L. Burr, plaintiffs in this cause, hereby appeal to the Supreme Court of the United States from the final order dismissing the complaint, entered in this action on November 10, 1964.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

II. The Clerk will please prepare a transcript of record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint filed March 17, 1964.
2. Application of Annie E. Harper for leave to sue in forma pauperis.
3. Application of Gladys A. Berry for leave to sue in forma pauperis.
4. Application of Curtis Burr for leave to sue in forma pauperis.
5. Application of Myrtle L. Burr for leave to sue in forma pauperis.
6. Order of the Court entered March 17, 1964 granting plaintiffs' applications to sue in forma pauperis.

[fol. 77] 7. Defendants' motion to dismiss filed April 13, 1964.

8. Defendants' answer filed April 20, 1964.

9. Plaintiffs' motion for leave to amend the complaint filed May 26, 1964.

10. Plaintiffs' motion for summary judgment filed May 26, 1964.

11. Order of the Court entered June 9, 1964 permitting amendment of the complaint and setting date for hearing on the merits and on all motions.

12. Defendants' answer to the amended complaint filed June 29, 1964.

13. Transcribed portions, on file in the Clerk's office, of the hearing before the Court on October 21, 1964, consisting of 54 pages.

14. Opinion of the Court entered November 10, 1964.

15. Final order of the Court dismissing the complaint entered November 10, 1964.

16. This notice of appeal.

II. The following questions are presented by this appeal:

A. Do provisions of Virginia law which require the payment of three years' cumulative poll taxes as a prerequisite to voting in state and local elections violate the Equal Protection clause of the Fourteenth Amendment by denying the franchise to paupers and indigents and other persons who are without economic means to pay the taxes, but who are otherwise qualified to vote?

B. Are plaintiffs who brought suit challenging the constitutionality of Virginia laws requiring payment of poll taxes as a prerequisite to voting in state and local elections on the ground that such requirement discriminatorily disenfranchises persons without the economic means to pay such taxes, and where the State asserts in defense that the plaintiffs are in-

eligible to vote because "paupers" are disqualified from voting under state law, entitled to seek and obtain a judicial determination that the "pauper" disqualification is invalid under the equal protection clause of the Fourteenth Amendment?

Philip Schwartz, 2054 14th Street, North, Arlington, Virginia.

[fol. 78] Certificate of Service (omitted in printing).

[fol. 79] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 80]

SUPREME COURT OF THE UNITED STATES

No. 835, October Term, 1964

ANNIE E. HARPER, et al., Appellants,

v.

VIRGINIA STATE BOARD OF ELECTIONS, et al.

Appeal from the United States District Court for the Eastern District of Virginia.

ORDER NOTING PROBABLE JURISDICTION—March 8, 1965

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

ANNIE E. HARPER, et al., *Appellants,*

v.

VIRGINIA STATE BOARD OF ELECTIONS, et al., *Appellees.*

On Appeal from the United States District Court for the Eastern District of Virginia

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JURISDICTIONAL STATEMENT

Appellants appeal from the final order dismissing the complaint, which was entered on November 10, 1964, by the District Court, comprised of three judges convened pursuant to Title 28, United States Code, Section 2284, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the Eastern District of Virginia, Alexandria Division, is not yet reported. The opinion and final order of the District Court are reprinted herein as Appendix B.

JURISDICTION

The jurisdiction of the District Court to decide the questions involved in this appeal was invoked under the Fourteenth Amendment to the United States Constitution, Title 42, United States Code, Section 1983, and Title 28, United States Code, Sections 1343(3), 2201 and 2202. The judgment of the District Court was entered on November 10, 1964, and notice of appeal was filed in that court on December 4, 1964. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The Court's jurisdiction to review the case on direct appeal is sustained by *Baker* v. *Carr,* 369 U.S. 186, and *Reynolds* v. *Sims,* 377 U.S. 533.

QUESTIONS PRESENTED

I. Whether provisions of Virginia law which require the payment of poll taxes as a prerequisite to voting in state and local elections violate the Fourteenth Amendment by denying the franchise to paupers and indigents and other persons who are without economic means to pay the taxes, but who are otherwise qualified to vote.

II. Whether persons who brought suit contesting the constitutionality of Virginia laws requiring the payment of poll taxes as a prerequisite to voting in state and local elections on the ground that such requirement discriminatorily disenfranchises them and other persons similarly situated who are without economic means to pay such taxes, and whose standing to sue is challenged by the State on the ground that "paupers" are disqualified from voting under state law, are entitled to a judicial determination that the "pauper"

disqualification is invalid under the Fourteenth Amendment.

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Virginia Constitution and of the State's statutes are set forth in Appendix A hereto.

STATEMENT

The appellants brought this action on behalf of themselves and others similarly situated, for the purpose of having declared unconstitutional and to enjoin the enforcement and execution of provisions of the Virginia Constitution and statutes which require the payment of poll taxes as a prerequisite to voting in state and local elections.[1] The appellants, in the District Court, also challenged the constitutionality of the provisions of Section 23 of the Virginia Constitution and Section 24-18 of the state Code which specify "paupers" as being disqualified from registering or voting in any election conducted in the State. The poll tax requirement and "pauper" exclusion were alleged by the appellants to be violative of the equal protection and due process clauses of the Fourteenth Amendment.

The appellants are citizens of the United States, and residents of Virginia and of Fairfax County within that State. They desire to register and vote in future state and local elections, and qualify to do so in every respect but one: they lack the economic means to pay the poll taxes required of them by the laws of Virginia.

Appellant Annie E. Harper is single; she formerly supported herself principally by doing household or

[1] The 24th Amendment to the United States Constitution prohibits a state from requiring payment of a poll tax as a condition of voting in elections to fill Federal offices.

domestic work; at present her sole regular income is derived from Federal social security benefits. Appellant Harper, because she has been a resident of Virginia for more than three years and has never paid poll taxes, is required by Virginia law to pay three years' back poll taxes ($1.50 a year), plus a five (5) percent penalty for late payment, or a total of $4.74, in order to register and qualify to vote in future state elections.

Appellant Gladys A. Berry is single; she is not gainfully employed and has no regular income; she provides day care for seven minor children, two of whom are her own and five of whom are the children of her two married daughters; both daughters are separated from their husbands and do household or domestic work to support themselves, appellant Berry, and said seven minor children. Appellant Berry, like appellant Harper, is disqualified from registering and voting in state elections in Virginia unless she pays three years' back poll taxes, plus 5 percent penalty, or a total of $4.74.

Appellant Curtis Burr works in the building and construction industry which is characterized by irregular employment because of weather conditions; in calendar 1963 his gross income was less than $5000. Appellant Curtis Burr's entire income is consumed in providing the necessities of life for his wife, appellant Myrtle L. Burr, and their nine (9) children. Although appellant Curtis Burr paid his poll taxes for 1961 and 1962, he did not pay the tax for 1963, and does not expect to be able to pay it hereafter, because of the low earnings received from his employment and the increasing cost of supporting his family, particularly as his children grow older. Since the annual poll tax in

Virginia is $1.50, plus 5 percent penalty for late payment, or a total of $1.58, in any year in which appellant Curtis Burr wishes to register and vote in a state election, he will have to show payment of three years' back poll taxes, plus penalties.

Appellant Myrtle L. Burr is supported by her husband, appellant Curtis Burr, whose annual income of less than $5000 is entirely consumed in providing the necessities of life for himself, his wife, appellant Myrtle L. Burr, and their nine children. Appellant Myrtle L. Burr, like appellants Harper and Berry, has been a resident of Virginia for more than three years, but because she has never paid poll taxes, she must pay a total of $4.74, in order to register and qualify to vote in state elections. If appellant Curtis L. Burr does not pay his poll taxes for 1964 and 1965, he will have to pay three years' cumulative taxes, plus penalties, for both himself and his wife, or a total of $9.48, before they will both be qualified to register and vote.

The appellees in this proceeding are the governmental boards and officers of the State of Virginia and Fairfax County, Virginia, who have responsibility under Virginia law to enforce the election laws by preventing persons who have not paid their poll taxes from voting in state and local elections.

This matter was heard on October 21, 1964, before a three-judge District Court convened pursuant to Title 28, United States Code, Section 2284.[2] On November 12, 1964, the Court rendered its decision and a final order denying the relief sought by the appellants. The District Court declined to hold the provisions of

[2] The case was consolidated for the purpose of hearing with a similar case (*Butts* v. *Harrison*, Civil Action No. 3346) then pending in the District Court.

Virginia law which require the payment of poll taxes as a prerequisite to registering and voting unconstitutional, for the stated reason that it was precluded from doing so by this Court's decision in *Breedlove* v. *Suttles*, 302 U.S. 277. The District Court also declined to hold the sections of state law barring "paupers" from registering and voting unconstitutional, on the ground that there was no showing of the disqualification being employed to prevent the appellants or members of their class from voting.

The ruling of the District Court upholding the constitutionality of the provisions of state law in question and refusing to enjoin their enforcement and execution constitutes the subject of this appeal.[3]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. Provisions of Virginia Law Which Require the Payment of Poll Taxes as a Prerequisite to Voting in State and Local Elections Violate the Fourteenth Amendment By Denying the Franchise to Paupers and Indigents and Other Persons Who Are Without Economic Means to Pay the Taxes, But Who Are Otherwise Qualified to Vote

By requiring the payment of poll taxes as a condition of voting in state and local elections, Virginia prevents the appellants and other members of the class they represent from exercising the franchise. Indigents, paupers and other persons too poor to pay such taxes are effectively prevented from voting by virtue of the state laws in question. This state practice is directly contrary to the view explicitly stated by this

[3] The appellants, because of their poverty, were granted permission by the District Court to bring their suit in *forma pauperis*. The American Civil Liberties Union has provided volunteer attorneys to represent them and is paying their costs for the purpose of this appeal.

Court—that a person's exercise of the franchise may not be impaired because of his "economic status." *Reynolds* v. *Sims*, 377 U.S. 533, 566. As the Court noted in the *Reynolds* case, discrimination in voting on economic grounds is equally as invidious as discrimination based on place of residence, such as was there in issue, or discrimination based on race (citing *Brown* v. *Board of Education*, 347 U.S. 483). Also impermissible under our constitutional system is discrimination against a voter based on the nature of his employment. *Davis* v. *Mann*, 377 U.S. 678, 691. These proscriptions against discrimination in voting, as the Court has repeatedly emphasized, are based on the philosophy of political equality which is fundamental to our system of government. As was stated in *Wesberry* v. *Sanders*, 376 U.S. 1, 17, "No right is more precious in a free society than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights are illusory if the right to vote is undermined." The governing principle has been aptly summarized by the Court in the recurrent phrase, "one person, one vote." *Reynolds* v. *Sims*, *supra*, 377 U.S. at 558, quoting *Gray* v. *Sanders*, 372 U.S. 368 at 381. And see *Wesberry* v. *Sanders*, *supra*, 376 U.S. at 18.

The fact that a person may be too poor to pay a specified sum of money, is not a valid basis for denying him the franchise. This is the clear teaching of *Griffin* v. *Illinois*, 351 U.S. 12, and *Douglas* v. *California*, 372 U.S. 353 (both cases cited in *Reynolds* v. *Sims*, *supra*, 377 U.S. at 566). In the *Griffin* case, which involved the right of an indigent defendant to appeal his conviction even though he could not pay for a required record of the trial proceeding, the Court stated that

"a State can no more discriminate on account of poverty than on account of religion, race, or color." 351 U.S. at 17. And in the *Douglas* case, where it was held that an indigent person must be afforded counsel on his first automatic appeal from a criminal conviction, the Court stated that not to do so is to draw "an unconstitutional line * * * between rich and poor." 372 U.S. at 357. The same unconstitutional line between "rich and poor" is the obvious consequence of the Virginia poll tax law which establishes $1.50 as the minimum price a person must pay to vote in a given year, with an increased amount which may be as high as $4.74 ($9.48 for married couple) if one has lived in the State but not voted for the preceding three years.[4]

It cannot be gainsaid that as a result of Virginia's poll tax requirement, many persons who are otherwise qualified to vote are rendered ineligible solely because of their poverty. Thus, the class of persons represented by the appellants in this proceeding includes, *inter alia,* individuals who are without any economic means whatsoever and who are dependent for subsistence on relatives, friends, and in many instances, the public welfare. The class also includes many other persons who

[4] Dissenting members of the Court in the *Douglas* case asserted that there is no constitutional infirmity in "a law of general applicability that may affect the poor more harshly than it does the rich." 372 U.S. at 361. They cited examples of state-imposed levies which the citizen must pay in order to receive benefits and privileges which the state is not otherwise obligated to provide. The poll tax is not such a levy, however, for the inability to pay it deprives poor persons, otherwise qualified to vote, of a prerogative to which they are entitled in a democratic society. As the Court stated in the *Reynolds* case, *supra,* 377 U.S. at 555, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."

have some identifiable income or property, but whose lives are characterized by poverty to such a degree that they cannot afford to pay money for other than food, clothing, housing, medical care, and other absolute necessities of life. Many such individuals are employed in low paying jobs; others are unemployed much of the time; while others have minimal incomes in the form of social security benefits, retirement pensions, unemployment compensation, medical disability benefits, and the like.[5]

Breedlove v. *Suttles*, 302 U.S. 277, relied upon by the District Court, should not be considered controlling with respect to the issue here as to the constitutionality of a state's requiring poll tax payments as a prerequisite to voting. The *Breedlove* case did not resolve the question in the context in which it is raised here of whether persons may be discriminated against on economic grounds in determining eligibility to vote. Furthermore, the result reached in the *Breedlove* case is manifestly incompatible with more recent pronouncements by the Court concerning the limitations imposed by the Fourteenth Amendment against a state's use of arbitrary and irrational classifications as a basis for disenfranchising its residents. For this

[5] An annual income of $3000 for a family of four is generally recognized today as the boundary of poverty. *Annual Report of the Council of Economic Advisors to the President, January 1964*, p. 58 (Gov't. Print. Off.). The Federal Census for 1960 revealed 27.9 percent of all families in Virginia having incomes below that amount, and 17.4 percent of Virginia families having incomes below $2000. It is further significant that 22.4 percent of the white families in the State have incomes below the $3000 standard, while among nonwhite families the proportion receiving a substandard income is appreciably greater—54.1 percent. United States Department of Commerce, Bureau of the Census, *1960 Census of Population, Supplementary Report*, PC (S1)-43.

reason, the *Breedlove* decision, in the appellants' view, should be re-examined by the Court at this time.

The District Court, in its opinion, referred to the fact that the Virginia poll tax is assessed against every adult resident irrespective of his intent to vote, thereby suggesting that the purpose of the tax is primarily to raise money for the State, rather than to limit the electorate.[6] This rationalization, however, has been specifically disavowed by the Virginia Supreme Court of Appeals which stated in justification of the tax that its "imposition was not intended primarily for the production of revenue, but to limit the right of sufferage to those who took sufficient interest in the affairs of the State to qualify themselves to vote." *Campbell* v. *Goode,* 172 Va. 463, 2 S.E. 2d 456, 457.

In other words, according to the Virginia Supreme Court of Appeals, the State, by imposing the tax, intends to deny the vote to all persons, regardless of their economic circumstances, who fail to pay the requisite amount and thereby signify their disregard of the electoral process. Granted that the State is entitled to take reasonable measures "to promote intelligent use of the ballot" (*Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 45, 51), it is clear that Virginia's justification for its poll tax requirement fails to satisfy the constitutional test of rationality. For, though the State professes to disqualify only those who are disinterested in voting, it is manifest that

[6] That the Virginia poll tax is not principally intended to serve as a source of revenue is evidenced by the fact that it does not become legally collectible, as do other Virginia taxes, at the time it becomes due. Section 22 of the State Constitution specifically provides against enforced collection of the poll tax by legal process until it has become three years past due.

among those disenfranchised are members of the large class of economically underprivileged who wish to vote and are responsible citizens, but who by virtue of their poverty cannot afford to pay the tax without sacrificing basic necessities of life. This being so, it cannot be doubted that the Fourteenth Amendment's guarantee of equal protection of law is offended insofar as indigents, paupers and others too poor to pay the tax are concerned. In other words, the State's classification bears no "reasonable and just relation to the act in respect to which classification is proposed * * *." *McLaughlin* v. *Florida*, No. 11, this Term, decided December 7, 1964, 85 S. Ct. 283, 287. The inability of an indigent person to pay the poll tax bears no more rational relationship to his interest in voting than does the ability to pay costs in advance bear any "rational relationship to a defendant's guilt or innocence * * *." *Griffin* v. *Illinois, supra,* 351 U.S. at 17-18.[7]

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[7] In *Baker* v. *Carr, supra,* 369 U.S. at 226, and subsequently in *Reynolds* v. *Sims, supra,* 377 U.S. at 557, the Court stated the standard of rationality which must be met under the Fourteenth Amendment as follows:

> Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action. (Emphasis the Court's)

II. Persons Who Brought Suit Contesting the Constitutionality of Virginia Laws Requiring the Payment of Poll Taxes as a Prerequisite to Voting in State and Local Elections on the Ground That Such Requirement Discriminatorily Disenfranchises Them and Other Persons Similarly Situated Who Are Without Economic Means to Pay Such Taxes, and Whose Standing to Sue Is Challenged by the State on the Ground That "Paupers" Are Disqualified from Voting Under State Law, Are Entitled to a Judicial Determination That the "Pauper" Disqualification Is Invalid Under the Fourteenth Amendment

As shown, Virginia, by requiring poll tax payments as a prerequisite to voting, denies the franchise to many persons who lack the economic means to pay the tax. As if to emphasize this unconstitutional delineation "between rich and poor" (*Douglas* v. *California*, *supra*, 372 U.S. at 357), Virginia has also written into its election laws a specific provision disqualifying "paupers" from registering or voting. This provision is so patently discriminatory, and hence invalid under the equal protection and due process clauses of the Federal Constitution, as to be unworthy of extended discussion.

Nevertheless, the State in apparent seriousness has, in this litigation, defended the constitutionality of the provision. The Virginia Attorney General, in his Answer on behalf of the appellee Virginia State Board of Elections, responded to the appellants' allegation of invalidity as to this provision by asserting that the "pauper" disqualification is "valid, constitutional and enforceable" (Answer filed June 29, 1964). Similarly, in the Attorney General's argument to the District Court one of his principal contentions was that the "pauper" disqualification is valid and that since the

appellants, by their own allegations of poverty, show themselves to be included within the term, they are not entitled to sue, because they would not be qualified to vote even in the absence of the poll tax. At the hearing before the District Court, the Attorney General asserted further that not only the appellants, but everyone in the large class of poor persons represented by them, would be subject to challenge at the polls on the basis of Virginia's "pauper" disqualification (Transcript of hearing, pp. 6-7, 14, 17, 23, 37).

With the issue thus joined, we submit that the District Court erred in dismissing the complaint with respect to this phase of the case. The assertion by the State that the disqualification applies to the appellants creates sufficient threat that they will be discriminatorily denied the franchise, to warrant a judicial declaration, as prayed for, that the provision is unconstitutional, as well as injunctive relief to restrain its enforcement. It is no answer to say, as the District Court did, that the appellants are without standing to challenge the "pauper" disqualification, because of the lack of showing that it has been employed in the past to prevent them or members of their class from voting. The record of this case shows that not only the poll tax requirement, but also the "pauper" disqualification, as construed by the State's Attorney General, are absolute barriers to exercise of the franchise by the appellants and members of their class. The two provisions are equally violative of the Fourteenth Amendment. The appellants in this litigation have demonstrated their entitlement to a declaration to this effect, as well as to appropriate injunctive relief.

CONCLUSION

It is submitted that the decision of the District Court should be reversed, for the reason that it conflicts with current understanding of the protections afforded by the Fourteenth Amendment, as propounded by this Court. The questions presented by this appeal are substantial and they are of public importance.

Respectfully submitted,

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January 1965.

APPENDIX

APPENDIX A

The provisions of the Virginia Consitution which are involved (in relevant part) are as follows:

Section 18. Qualifications of voters.—Every citizen of the United States, twenty-one years of age, who has been a resident of the State one year, of the county, city, or town, six months, and of the precinct in which he offers to vote, thirty days, next preceding the election in which he offers to vote, has been registered, and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people; * * *

Section 20. Who may register.—Every citizen of the United States, having the qualifications of age and residence required in section eighteen, shall be entitled to register, provided:

First. That he has personally paid to the proper officer all State poll taxes legally assessed or assessable against him for the three years next preceding that in which he offers to register; or, if he came of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, has paid one dollar and fifty cents, in satisfaction of the first year's poll tax assessable against him; * * *

Section 21. Conditions for voting.—A person registered under the general registration of voters during the years nineteen hundred and two and nineteen hundred and three, or under the last section, shall have the right to vote for all officers elective by the people, subject to the following conditions:

That unless exempted by section twenty-two, he shall, as a prerequisite to the right to vote, personally pay, at least six months prior to the election, all State poll taxes assessed or assessable against him, under the Constitution,

during the three years next preceding that in which he offers to vote. * * *

Section 22. Persons exempt from payment of poll tax as condition of right to vote.—No person, nor the wife or widow of such person, who, during the late war between the States, served in the army or navy of the United States, or of the Confederate States, or of any State of the United States, or of the Confederate States, shall at any time be required to pay a poll tax as a prerequisite to the right to register or vote. The collection of the State poll tax assessed against anyone shall not be enforced by legal process until the same has become three years past due.

Section 23. Persons excluded from registering and voting.—The following persons shall be excluded from registering and voting: Idiots, insane persons and paupers; persons who, prior to the adoption of this Constitution, were disqualified from voting, by conviction of crime, either within or without this State, and whose disabilities shall not have been removed; persons convicted after the adoption of this Constitution, either within or without this State, of treason, or of any felony, bribery, petit larceny, obtaining money or property under false pretenses, embezzlement, forgery or prejury; persons who while citizens of this State, after the adoption of this Constitution, have fought a duel with a deadly weapon, or sent or accepted a challenge to fight such a duel, either within or without this State, or knowingly conveyed such a challenge, or aided or assisted in any way in the fighting of such duel.

Section 38. Duties of treasurers, clerks of circuit and corporation courts and sheriffs in regard to making, filing, delivering and posting list of paid poll taxes; how corrected.—The treasurer of each county and city shall, at least five months before each regular election, file with the clerk of the circuit court of his county, or of the corporation court of his city, a list of all persons in his county or city, who have paid not later than six months prior to such

election, the State poll taxes required by this Constitution during the three years next preceding that in which such election is held; which list shall be arranged alphabetically, by magisterial districts in the counties, and in such manner as the General Assembly may direct in the cities, shall state the white and colored person separately, and shall be verified by the oath of the treasurer. The clerk, within ten days from the receipt of the list, shall make and certify a sufficient number of copies thereof, and shall deliver one copy for each voting place in his county or city, to the sheriff of the county or sergeant of the city, whose duty it shall be to post one copy, without delay, at each of the voting places, and, within ten days from the receipt thereof, to make return on oath to the clerk, as to the places where and dates at which said copies were respectively posted, which return the clerk shall record in a book kept in his office for the purpose; and he shall keep in his office, for public inspection, for at least sixty days after receiving the list, not less than ten certified copies thereof, and also cause the list to be published in such other manner as may be prescribed by law. The original list returned by the treasurer shall be filed and preserved by the clerk among the public records of his office for at least five years after receiving the same.

Within thirty days after the list has been so posted, any person who shall have paid his capitation tax, but whose name is omitted from the certified list, may after five days' written notice to the court of his city, or to the judge thereof in vacation, to have the same corrected and his name entered thereon, which application the court or judge shall promptly hear and decide.

The clerk shall deliver, or cause to be delivered, with the poll books, at a reasonable time before every election, to one of the judges of election of each precinct of his county or city, a like certified copy of the list, which shall be conclusive evidence of the facts therein stated for the

purpose of voting. The clerk shall also, within sixty days after the filing of the list by the treasurer, forward a certified copy thereof, with such corrections as may have been made by order of the court or judge, to the officer designated by law, who shall charge the amount of the poll taxes stated therein to such treasurer, unless previously accounted for.

Further evidence of the prepayment of the capitation taxes required by this Constitution, as a prerequisite to the right to register and vote, may be prescribed by law.

• • • • • • • • • • •

The Provisions of the Virginia statutes (1950 Code, as amended) which are involved (in revelant part) are as follows:

Section 24-17. Persons entitled to vote at all general elections.—Every citizen of the United States twenty-one years of age, who has been a resident of the State one year, of the county, city or town, six months, and of the precinct in which he offers to vote thirty days next preceding the general election, in which he offers to vote, has been duly registered under the provisions of Section 24-67, and who, at least six months prior to such election in which he offers to vote, has personally paid to the proper officer all State poll taxes assessed or assessable against him for the three years next preceding the year in which such election is held, and is otherwise qualified, under the Constitution and laws of this State, shall be entitled to vote for members of the General Assembly and all officers elective by the people.
• • •

Section 24-18. Persons disqualified from registering and voting.—The following persons shall be excluded from registering and voting: Idiots, insane persons and paupers; persons who, prior to the adoption of the Constitution, were disqualified from voting by conviction of crime, either within or without the State, and whose disabilities shall not have been removed; persons convicted after the adop-

tion of the Constitution, either within or without this State, of treason, or of any felony, bribery, petit larceny, obtaining money or property under false pretenses, embezzlement, forgery or perjury; persons who, while citizens of this State since the adoption of the Constitution, have fought a duel with a deadly weapon, or sent or accepted a challenge to fight such duel, either within or without this State, or knowingly conveyed a challenge, or aided or assisted in any way in the fighting of such duel. • • •

Section 24-22. Qualifications of voters at special elections.—The qualifications of voters at any special election shall be such as are hereinbefore prescribed for voters at general elections, but at any such special election, held before the second Tuesday in June in any year, any person shall be qualified to vote who was so qualified at the last preceding regular November election, or who is otherwise qualified to vote, and has personally paid, at least six months prior to the second Tuesday in June of that year, all State poll taxes assessed or assessable against him during the three years next preceding that in which such special election is held, and at any such special election, held on or after the second Tuesday in June in any year, any person shall be qualified to vote who is or was qualified to vote at the regular election held on the Tuesday after the First Monday in November of that year. • • •

Section 24-67. Who to be registered for all elections.—(a) Each registrar shall register pursuant to the provisions of this paragraph every citizen of the United States, of his election district, who shall apply in person to be registered at the time and in the manner required by law, who at the time of the next general election, shall have the qualifications of age and residence required in Section 18 of the Constitution of Virginia, and who has paid to the proper officer all State poll taxes assessed or assessable against him for the three years next preceding the year in which such election is held, or if he come of age at such

time that no poll taxes shall be assessable against him for the year preceding the year in which he offers to register, has paid one dollar and fifty cents in satisfaction of the year's poll tax assessable against him. * * *

Section 24-120. Treasurer to file lists with clerk.—The treasurer of each county and city shall, at least five months before the second Tuesday in June in each year in which a regular June election is to be held in such county or city, and at least one hundred and fifty-eight days before each regular election in November, file with the clerk of the circuit court of his county or the corporation court of his city (1) a list of all persons in his county or city who have filed certificates of residence under section 24-172, and (2) a separate list of all persons in his county or city who have paid not later than six months prior to each of such dates the State poll taxes required by the Constitution of this State during three years next preceding that in which such election is to be held, which lists shall state the white and colored persons separately, if known, and shall be verified by the oath of the treasurer. The treasurer shall, in each such list, designate as a tribal Indian any person who requests to be so designated and who shall have furnished the treasurer with an affidavit, made by the Chief of any Indian tribe existing in this State, that such person is a member of such tribe and to the best knowledge and belief of the Chief is a tribal Indian as defined in Section 1-14 of the Code of Virginia. * * *

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT ALEXANDRIA

Civil Action No. 3253

ANNIE E. HARPER, ET AL., *Plaintiffs*

v.

VIRGINIA STATE BOARD OF ELECTIONS, ET AL., *Defendants.*

Civil Action No. 3346

MRS. EVELYN BUTTS, *Plaintiff*

v.

ALBERTIS HARRISON, Governor, ET AL., *Defendants.*

(Argued October 21, 1964 Decided November 10, 1964)

Before Bryan, Circuit Judge, and Lewis and Butzner, District Judges.

J. A. Jordan, Jr., Norfolk, Virginia, Len W. Holt, Washington, D. C., and Max Dean and Robert L. Segar, both of Flint, Michigan, counsel for plaintiffs in No. 3346; and Ira M. Lechner and Allison W. Brown, Jr., both of Washington, D. C. and Philip Schwartz, Arlington County, Virginia, counsel for plaintiffs in No. 3253.

Robert Y. Button, Attorney General of Virginia and Richard N. Harris, Assistant Attorney General of Virginia, both of Richmond, Virginia, counsel for defendants Virginia State Board of Elections in No. 3253 and counsel for Albertis Harrison, Governor, in No. 3346, Donald C. Crounse, Assistant Commonwealth's Attorney, Fairfax County, Virginia, counsel for Electoral Board of Fairfax County and Waneta M. Buckley, General Registrar of Fairfax County, Virginia

in No. 3253; Alfred W. Whitehurst, Commonwealth's Attorney, City of Norfolk, Norfolk, Virginia, counsel for Mary Dudley, City Registrar, City of Norfolk, Alex H. Bell, City Treasurer, City of Norfolk, and William Prieur, Clerk, the Corporation Court, City of Norfolk, all of Norfolk, Virginia in No. 3346.

PER CURIAM:

Poll tax payment as a prerequisite to voting in State and local elections, exacted by the Constitution and statutes of Virginia,[1] is attacked in these two consolidated actions as violative of the no-abridgment and equal protection commands of the Federal Fourteenth Amendment. A corollary attack is made upon the provision of the State constitution excluding "paupers" as persons entitled to vote in any election.[2]

The common premise of the assaults is: that the plaintiffs are financially unable to pay the tax—$1.50 for each of the 3 preceding years for which the elector was assessable; and that they and other State citizens similarly impecunious are thereby deprived, solely on account of their poverty, of the privilege to vote, and at the same time they are also denied a privilege accorded other citizens not so poor.

Notwithstanding the plaintiffs' improverishment and eligibility to vote, their denunciation of the State constitutional and statutory poll tax requirements has been squarely refuted by the Supreme Court in Breedlove v. Suttles, 302 U.S. 277, 283 (1937). We are not at liberty to

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[1] Va. Constitution §§ 18, 20, 21 and 38; 1950 Code of Va. as amended §§ 24-17, 24-22, 24-67, and 24-120. The separation by race or color, as required in § 38 of the Va. constitution and § 24-120 of the Code of Virginia, in the listing of persons who have paid the poll taxes was declared invalid by this court in Hamm v. Virginia State Board of Elections, 230 F. Supp. 156, aff'd October 26, 1964, ... U.S. ....

[2] Va. Constitution § 23; 1950 Code of Va. § 24-18, as amended.

deviate from that precept. There the Court considered arguments akin to those of the plaintiffs here, including the economic factor, and rejected them. This court adhered to that precedent in Butler v. Thompson, 97 F. Supp. 17, 22 (1951), aff'd per curiam 341 U.S. 937. In this it adverted to the like holding of this Circuit in Saunders v. Wilkins, 152 F.2d 235, 237 (1945), cert. denied 328 U.S. 870, rehearing denied 329 U.S. 824, an appeal touching the Virginia constitutional and statutory clauses now questioned. The tax is levied upon every adult resident irrespective of his intent to vote.[3] Moreover, no racial discrimination is exhibited in its application as a condition to voting. Cf. Butler v. Thompson, supra, 97 F. Supp. 17, 21.

Adequate answer to the attack upon the exclusion of paupers is that this disqualification—apparently of early historical origin and prevalent in several States—has not been employed to prevent the plaintiffs or their class from voting. Plaintiffs do not essay a showing that they, or anyone else in destitute circumstances, have been designated "paupers" in the sense of the Virginia constitution. Therefore, an expression by us upon the meaning and implications of that term would be entirely academic and without place here.

The complaint in each of these cases will be dismissed.

Dismissed.

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[3] Va. Constitution § 173; Code of Va. § 58-49.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT ALEXANDRIA

Civil Action No. 3253

ANNIE E. HARPER, ET AL., *Plaintiffs*

v.

VIRGINIA STATE BOARD OF ELECTIONS, ET AL., *Defendants*

Civil Action No. 3346

MRS. EVELYN BUTTS, *Plaintiff*

v.

ALBERTIS HARRISON, Governor, ET AL., *Defendants*

Final Order

Upon consideration of the pleadings, the exhibits, the stipulations and other parts of the record in these cases, as well as the briefs and oral arguments of counsel, for reasons stated in the Court's written opinion this day filed, it is

ORDERED that each of the said complaints be, and it is hereby, dismissed.

_____

United States Circuit Judge

_____

United States District Judge

_____

United States District Judge

November 10, 1964

FILE
FEB 15
JOHN F. DAVIS

IN THE

Supreme Court of the United States

October Term, 1964

No. 48

ANNIE E. HARPER, ET AL., APPELLANTS,

v.

VIRGINIA STATE BOARD OF ELECTIONS, ET AL.

On Appeal from the United States District Court for the Eastern District of Virginia

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IN THE

Supreme Court of the United States

October Term, 1964

No. 835

ANNIE E. HARPER, ET AL., APPELLANTS,

v.

VIRGINIA STATE BOARD OF ELECTIONS, ET AL.

On Appeal from the United States District Court for the Eastern District of Virginia

APPELLEES' MOTION TO AFFIRM

The Appellees move this Court to affirm on the ground that the questions presented by this appeal are so unsubstantial as not to need further argument.

STATEMENT

As is clearly set forth in the Jurisdictional Statement, this is an appeal from an order of dismissal in the court below.

This action was instituted as an attack upon those provisions of the Constitution and laws of Virginia which require the payment of a poll tax as a prerequisite to registration and voting in state and local elections. The Appellants based their attack upon the sole ground that they lacked

the economic means to pay the poll tax and that, therefore, as to them, the tax was violative of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

Following the filing by the Appellees of a Motion to Dismiss in the court below, on the ground, among others, that the Appellants lacked the capacity and standing to bring this suit because Section 23 of the Constitution of Virginia excludes "paupers" from registration and voting, the Appellants, with the consent of the court below, amended their Complaint, adding thereto an attack upon Section 23 of the Constitution of Virginia and upon § 24-18 of the Code of Virginia of 1950 (which is a codification of Section 23 of the Constitution) as being violative of the Fourteenth Amendment.

The foundation of the Appellees' contention that the Appellants lacked the capacity to sue was that Appellants, by their affidavits filed *in forma pauperis* under the provisions of 28 U.S.C., § 1915(a) (1958), and by their allegations in the Complaint with reference to themselves and to the members of the class on behalf of which they allegedly brought suit, established themselves and the members of the class as "paupers" within the meaning of the use of that word in Section 23 of the Virginia Constitution.

In dismissing the Complaint, the court below found that this Court's opinion in *Breedlove* v. *Suttles*, 302 U.S. 277, 283 (1937) was squarely dispositive of the Appellants' denunciation of Virginia's constitutional and statutory poll tax requirements. The court below further found that there was no substance to the Appellants' attack on the "pauper" exclusion provision of the Virginia Constitution because Appellants did not allege or prove that this exclusion had been employed to prevent them or their class from voting, or that

they or anyone else had ever been designated a "pauper" within the meaning of the Constitution of Virginia.

ARGUMENT

I

As is recognized by the Appellants (Jurisdictional Statement at p. 10) and as was stated by the court below in its opinion (Jurisdictional Statement, App. 8a), *Breedlove* v. *Suttles,* 302 U.S. 277 (1937) is dispositive of the questions presented by this appeal. Appellants suggest that *Breedlove* did not resolve the questions which are presented in this case "in the context" in which they are presented, that is, in the context of economic inability to pay the tax (Jurisdictional Statement at p. 9). As the court below noted, the ground upon which the Appellants attack the poll tax here was one of the grounds upon which it was attacked in *Breedlove.* (See Record on Appeal in this Court in *Breedlove* v. *Suttles,* No. 9, Oct. Term, 1937, paragraphs 27, 28, 29, 30, 34(d) and (g) of the Petition filed in the Superior Court of Fulton County, Ga., beg. R. 9. See, also, R. 20 of *Breedlove* in this Court, amendments to the original Petition. In addition, see in *Breedlove* record, p. 3-5 of Appellant's Brief in Opposition to Appellee's Motion to Dismiss the Appeal, p. 3 of Jurisdictional Statement, p. 5, 6, 13, 14 of Appellant's Brief.) For example, at p. 14 of Appellant's Brief filed in this Court in *Breedlove,* this statement appears:

> "There is certainly very little correlation between the ability of a man to vote and his ability to pay a poll tax. Many of the world's great thinkers would have undoubtedly been deprived of the right of franchise under this Georgia statute. Certainly the great literary figures of times past, who were properly, by mental equipment, most qualified to exercise the right of suff-

> rage, would have been precluded from voting in Georgia."

In reply to this contention, as well as to the contention that an exemption of certain classes was improper, this Court noted that:

> "Levy by poll tax has long been a familiar form of taxation, much used in some countries and to a considerable extent here, at first in the colonies and later in the states. To prevent burdens deemed grievous and oppressive, the Constitutions of some states prohibit or limit poll taxes. That of Georgia prevents more than a dollar a year. Article 7, § 2, par. 3, Code, § 2-5004. Poll taxes are laid upon persons without regard to their occupations or property to raise money for the support of government or some more specific end. The equal protection clause does not require absolute equality. While possible by statutory declaration to levy a poll tax upon every inhabitant of whatsoever sex, age or condition, collection from all would be impossible for *always there are many too poor to pay*. Attempt equally to enforce such a measure would justify condemnation of the tax as harsh and unjust. * * *" *Breedlove* v. *Suttles*, 302 U.S. 277, 281 (1937). (Italics added).

(Note that the Constitution of Virginia, as does that of Georgia, limits the amount of the poll tax. See Virginia Constitution, Section 173.)

In its unanimous opinion in *Breedlove*, this Court further stated that (302 U.S. at 283-4):

> "Payment (of the tax) as a prerequisite (to voting) is not required for the purpose of denying or abridging the privilege of voting. * * * Exaction of payment before registration undoubtedly serves to aid collection from electors desiring to vote, but that use of the state's

power is not prevented by the Federal Constitution. Cf. *Magnano Co.* v. *Hamilton,* 292 U.S. 40, 44.

"To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected by the Fourteenth Amendment. Privilege of voting is not derived from the United States, but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate. *Minor* v. *Happersett,* 21 Wall. 162, 170 et seq. *Ex parte Yarbrough,* 110 U.S. 651, 664-665. *McPherson* v. *Blacker,* 146 U.S. 1, 37-38. *Guinn* v. *United States,* 238 U.S. 347, 362. The privileges and immunities protected are only those that arise from the Constitution and laws of the United States and not those that spring from other sources. *Hamilton* v. *Regents,* 293 U.S. 245, 261.

"* * * The payment of poll taxes as a prerequisite to voting is a familiar and reasonable regulation long enforced in many States and for more than a century in Georgia. That measure reasonably may be deemed essential to that form of levy. Imposition without enforcement would be futile. Power to levy and power to collect are equally necessary. And, by the exaction of payment before registration, the right to vote is neither denied nor abridged on account of sex. It is fanciful to suggest that the Georgia law is a mere disguise under which to deny or abridge the right of men to vote on account of their sex. The challenged enactment is not repugnant to the Nineteenth Amendment."

Following the *Breedlove* case, the Tennessee poll tax was attacked. In *Pirtle* v. *Brown, et al.,* 118 F. 2d 218 (6th Cir. 1941), *cert. den.* 314 U.S. 621, the question, as stated by the court, was whether the Constitution and statutes of Tennessee, which made the payment of a poll tax a condition precedent to the right to vote for members of Con-

gress, were repugnant to any provisions of the Constitution of the United States. This question was answered in the negative and poll tax payment as a prerequisite to voting was held to be valid in all respects, as a legitimate and proper exercise of the power of the state. The court relied on *Breedlove, supra,* as having already conclusively decided the issue.

In *Saunders* v. *Wilkins,* 152 F. 2d 235 (4th Cir. 1945), *cert. den.* 328 U.S. 870, *reh. den.* 329 U.S. 824, an indirect attack was made on the provisions of the Constitution and laws of Virginia imposing poll tax payment as a prerequisite to voting. Plaintiff alleged that 60% of the inhabitants of the state were disenfranchised by the poll tax requirement (see 152 F. 2d at 236-8), presumably on the theory that economically they could not afford to pay it. The court adhered to the precedent established by *Breedlove* and upheld the validity of the Virginia Constitution and laws requiring poll tax payment as a prerequisite to voting.

In *Butler* v. *Thompson,* 97 F. Supp. 17 (E.D. Va. 1951), *affm'd per curiam* 341 U.S. 937, the Virginia poll tax was again attacked on grounds similar, and in some instances identical, to those alleged by the Appellants in the instant case. The court, again adhering to *Breedlove,* held the tax to be a valid exercise of state power.

Finally, an early decision holding the poll tax to be valid as a prerequisite of the right to vote, after an attack upon it on the ground that payment of the tax discriminated against the poor and was, therefore, a denial of rights protected by the Fourteenth Amendment, is *Frieszleben* v. *Shallcross,* 9 Houst. (Del.) 1, 19 A. 576, 8 L.R.A. 337 (1890).

See, also, Annot. 82 L. Ed. 257 (1937).

II

The Twenty-fourth Amendment to the Constitution of the United States, as ratified on February 4, 1964, reads as follows:

> "Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.
>
> "Section 2. The Congress shall have power to enforce this article by appropriate legislation."

An examination of this wording reveals that the amendment was clearly intended to in no way prevent the states from making payment of a poll tax a condition of the right to vote in state and local elections. Its single and only purpose was to prevent the states from making payment of a poll tax a condition of the right to vote in federal elections. This would appear to be obvious from the terms of the amendment itself; nothing at all is said about the power of the states to regulate their own elections. If Congress had intended to affect the states' long-established powers in this respect, it would certainly have declared this intent in the amendment.

That the above is a proper conclusion as to the intent of Congress is further demonstrated by a comparison of the Twenty-fourth Amendment with two other amendments also concerning the right to vote: the Fifteenth and Nineteenth Amendments. The latter two amendments commence in the same language as the Twenty-fourth Amendment: "The right of citizens of the United States to vote. . . ." But these latter amendments immediately go on to state con-

ditions which may not be used by the states to deny or abridge the right to vote, *without* specifying in what types of elections the conditions may not be so used. In contrast, the Twenty-fourth Amendment specifies the types of elections in which the right to vote may not be conditioned upon payment of a poll tax.

Thus, while the Fifteenth and Nineteenth Amendments were intended to apply to *all* elections (local, state and federal), the Twenty-fourth Amendment was clearly intended to apply to federal elections only and was not intended to forbid the states from retaining or imposing payment of a poll tax as a prerequisite for voting in any state or local election.

This conclusion from the wording of the Twenty-fourth Amendment is amply supported by its legislative history. The amendment was proposed to the states by Senate Joint Resolution 29, adopted by the 87th Congress (2d Sess. 1962). As originally reported out of committee in the Senate, S. J. R. 29 provided for the establishment of a former dwelling house of Alexander Hamilton as a national shrine. However, on the floor of the Senate, Senator Holland of Florida offered an amendment striking out the language of the original resolution and inserting the above wording of the Twenty-fourth Amendment. Debate on the measure extended from March 14-24, 1962, and fills 1,000 pages of the Congressional Record. Senator Holland's amendment was ultimately adopted by voice vote, and the amended resolution was passed by a vote of 77 to 16 in the Senate. 108 Cong. Rec. 5105 (1962).

In the House, S.J.R. 29 was heard by Subcommittee No. 5 of the House Committee on the Judiciary, which conducted two days of hearings on S.J.R. 29 and nine separate House joint resolutions also dealing with amendments to the

U. S. Constitution to abolish tax and property qualifications for voting in federal elections or in all elections. *Hearings before Subcommittee No. 5 of the House Committee on the Judiciary,* 87th Cong., 2d Sess., ser. 25 (1962). Only S.J.R. 29 was reported out by the subcommittee, and all House joint resolutions were rejected. *H. R. Report No. 1821,* 87th Cong., 2d Sess. (1962).

S. J. R. 29 was reported out of the House Judiciary Committee on June 13, 1962. After a brief debate of about 40 minutes on August 27, 1962, the resolution was passed by a two-thirds vote of the House of Representatives. 108 Cong. Rec. 17670 (1962).

The legislative record abounds with statements of intent as to the scope and effect of the Twenty-fourth Amendment as embodied in S. J. R. 29. Examples from the extended Senate debate are as follows:

> "MR. HOLLAND. My second question is this: Does not the Senator from Alabama know that the amendment which I and 66 other Senators propose does not prohibit the imposition of a poll tax as a prerequisite to voting in State and local elections, but relates only to the election of President, Vice President, and Members of Congress?" 108 Cong. Rec. 4199 (1962).

> "MR. HOLLAND. I understood that the proposal in Virginia [1949 referendum] was related to the complete elimination of the poll tax. Whereas the present proposal, in an undoubted constitutional form, has to do only with the imposition of the poll tax as a requirement for voting for Federal elective officials and does not relate to or interfere with the affairs of the State of Virginia in connection with its State elections." 108 Cong. Rec. 4529 (1962).

> "MR. HOLLAND. Does not the Senator know that the proposed amendment which the Senator from Florida hopes he will have an opportunity to offer does not

affect in the slightest the right of the State of Arkansas, under its present poll tax law, to continue to collect the poll tax and to continue to require the payment of a poll tax as a condition for voting for State, county, and local offices? Does not the Senator think it is almost unkind of him to allow the official in Arkansas who has written him to believe that this amendment really affects him in that way at all?" 108 Cong. Rec. 4836 (1962).

"MR. YARBOROUGH. This proposed constitutional amendment, if adopted, would apply only to elections to Federal office; it would not apply to elections for State, county, city, or any other local office. In this respect, it is more restricted than the 15th Amendment, which provides that the right to vote 'shall not be denied or abridged on account of race, color, or previous condition of servitude' in any election, State or Federal. It is also more restrictive than the 19th Amendment—the woman's suffrage amendment—which provides that the right to vote shall not be denied or abridged on account of sex, in any State or Federal election." 108 Cong. Rec. 4911 (1962).

See, also, 108 Cong. Rec. 4892 (1962) (remarks of Senator Holland to Senator McClellan) where Senator Holland again states during debate that the amendment applies only to federal elections.

The hearings of the House subcommittee also make it abundantly clear that Senate Joint Resolution 29 was to apply solely to federal elections. Senator Holland's repeated statement is set forth on page 25 of the hearings as follows:

"... it prohibits poll taxes only with reference to the right to vote for certain specified Federal offices. It does not prevent the imposition of a poll tax as a prerequisite for voting for State or local officials or upon State or local issues. I emphasize this point, Mr. Chair-

> man, because many of us who are cosponsors of this joint resolution strongly feel that the election of State and local officials and the making of decisions on strictly local matters, such as bond issues, tax mileage questions, referendums, recall procedures, and the like, are properly and more effectively handled on the State and local level, and we would strenuously oppose any effort to control such matters by Federal law." *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary,* 87th Cong., 2d Sess., ser. 25, at 25 (1962).

In addition, exchanges between the subcommittee and Representative Henry B. Gonzalez in respect to his House Joint Resolution 594, which proposed a constitutional amendment abolishing the poll tax in *all* elections, highlight the salient difference between the two approaches to abolishing the poll tax and emphasize the significance of the approval of the approach of S. J. R. 29, rather than H. J. R. 594, which was rejected. *Id.* at 15.

The House Report on S. J. R. 29 specifically states the following:

> "Section 1 of the proposed article would eliminate as a prerequisite to vote in any primary or other election for President or Vice President, for electors for President or Vice President or for Senator or Representative in Congress the requirement to pay any poll tax or other tax. The limitation proposed by this section includes not only any State but also the United States. It would also prevent both the United States and any State from setting up any substitute tax in lieu of a poll tax as a prerequisite for voting in primary elections for those specified Federal officials. This prevents the nullification of the amendment's effect by a resort to subterfuge in the form of other types of taxes. However, this section would not prevent a State from imposing a poll tax in purely State or local elections." *H. R. Report No. 1821,* 87th Cong., 2d Sess., at 5 (1962).

The Minority Views also conceded that "The proposed amendment would outlaw the poll tax in Federal elections only." *Id.* at 6. The minority noted that "[T]he joint resolution owes much of its support to the fact that it does not affect State elections but only Federal elections . . . ." *Id* at 9. Finally, to make its intent unmistakably clear, the House Committee rejected H.J.R. 594, sponsored by Representative Gonzalez of Texas and intended by him to apply to *all* elections, at the same time it approved and reported out S.J.R. 29.

While statements of the Representatives were necessarily brief in the short House debate, it was made clear repeatedly that the proposed constitutional amendment applied solely to federal elections. Representative Celler stated the following in this regard:

> "I am aware that this resolution only affects voting in Federal elections. States could inflict the tax on ballots in State or local elections. This might mean double or bobtail ballots." 108 Cong. Rec. 17656 (1962).

Representative Lindsay of New York expressed his concern that Senate Joint Resolution 29 was not broad enough, stating:

> "Such an amendment should abolish impediments to voting in local elections as well as State elections. It should not be confined to Members of Congress." 108 Cong. Rec. 17660 (1962).

Representative Poff of Virginia explained why he was going to vote in favor of this constitutional amendment as follows:

"I am opposed to a Constitutional amendment if that amendment reaches into State and local elections.

"However, a Constitutional amendment which is confined to Federal elections and which is ratified by the States as the Constitution provides is not an unconstitutional invasion of States rights, and such an amendment I feel obliged to support." 108 Cong. Rec. 17661 (1962).

Similar comments as to the resolution being limited solely to federal elections were made by Congressmen Ryan and Whitten, 108 Cong. Rec. 17663-4 and 17666-7 (1962).

In addition to the record with respect to S. J. R. 29, there are voluminous materials from prior sessions of Congress dealing with similar attempts to eliminate poll taxes, either by constitutional amendment or by statute. Anti-poll tax legislation was introduced in every Congress from 1939 to 1962. The House passed five bills and the Senate two proposed constitutional amendments before S. J. R. 29 was finally adopted by both Houses. *H. R. Report No. 1821, supra*, at 2.

Throughout this period, Senator Holland was not only the chief draftsman and patron of the constitutional amendment approach, but the acknowledged expert of Congress on poll tax laws. Senator Holland repeatedly, clearly and emphatically stated that his proposed amendment applied to federal elections only and was not intended to affect state or local elections in any way. See Hearings on S. J. R. 58, *Hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 87th Cong., 1st Sess., pt. 1, at 86, 100, 159-61 (1961); Hearings on S. J. R. 126, *Hearings Before a Subcommittee on Poll Tax and Enfranchisement of the District of Columbia of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess., at 5, 6, 10, 14, 18, 46 (1959); Senate Debate on S. J. R. 39,

86th Cong., 2d Sess. (1960), 106 Cong. Rec. 1517; Hearings on S. J. R. 29, *Hearings Before a Subcommittee on Qualifications of Electors of the Senate Committee on the Judiciary*, 84th Cong., 2d Sess., at 33 (1956).

Seldom has the legislative history of an enactment been so clear. It was intended to abolish the poll tax in federal elections only and leave the states free to regulate state and local elections as they saw fit. As already mentioned, the proposed amendment was ratified by the necessary number of states on February 4, 1964.

We have set forth this history at such great length to make it abundantly clear that over a period of many years, in many sessions and before many committees of Congress, in meetings and debates throughout the land, the question of the poll tax was the subject of long and thoughtful consideration. From this history and from the history of the adoption and ratification of the Senate Joint Resolution which became Amendment Twenty-four only one conclusion can be drawn. That conclusion is that the Congress, the states and the people of the entire United States, after years of serious and almost never ending discussion and debate, have just expressed themselves beyond the shadow of the slighest doubt as desiring the retention of the right of the states to require a poll tax as a prerequisite for voting in state and local elections.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the questions presented by this appeal are so unsubstantial as not to need further argument and that, therefore, the decision of the court below should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on the 15th day of February, 1965 I served the foregoing Motion on the Appellants herein by mailing a copy thereof in duly addressed envelopes, with first-class postage prepaid, to their respective counsel of record as follows: Lawrence Speiser and Allison W. Brown, Jr., Esquires, c/o American Civil Liberties Union, Suite 803, 1101 Vermont Ave., N.W., Washington 5, D.C.; Ira M. Lechner and Philip Schwartz, Esquires, 2054 14th Street, North, Arlington, Virginia.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 48

ANNIE E. HARPER, ET AL., APPELLANTS

v.

VIRGINIA STATE BOARD OF ELECTIONS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The *per curiam* opinion of the district court (R. 31–33) is reported at 240 F. Supp. 270.

JURISDICTION

The final order of the three-judge district court dismissing the complaints [1] was entered on November 10, 1964 (R. 34). Notice of appeal to this Court was filed on December 4, 1964 (R. 35–37) and probable jurisdiction was noted on March 8, 1965 (R. 37; 380 U.S. 930). The jurisdiction of this Court rests on 28 U.S.C. 1253.

[1] This case was consolidated in the district court with *Butts* v. *Harrison*, Civ. A. No. 3346 (E.D. Va.), appeal pending, No. 28 Misc., this Term, which involves similar issues.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment provides:

> * * * No State * * * shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 10 of the Voting Rights Act of 1965 (79 Stat. 442–443) is printed in Appendix A, *infra*, pp. 41–42.

Section 173 of the Virginia Constitution, as amended, provides:

> The General Assembly shall levy a State capitation tax of, and not exceeding one dollar and fifty cents per annum on every resident of the State not less than twenty-one years of age, except those pensioned by this State for military services; one dollar of which shall be applied exclusively in aid of the public free schools, and the residue shall be returned and paid by the State into the treasury of the county or city in which it was collected, to be appropriated by the proper authorities to such county or city purposes as they shall respectively determine * * *.

Section 18 of the Virginia Constitution, as amended, provides:

> Every citizen of the United States, twenty-one years of age, who has been a resident of the State one year, of the county, city, or town, six months, and of the precinct in which he offers to vote, thirty days next preceding the election in which he offers to vote, has been registered, and has paid his State poll taxes * * * shall be entitled to vote for members of

> the general assembly and all officers elective by the people * * *.

Other relevant provisions of the Constitution and statutes of Virginia are set out in Appendix A, *infra*, pp. 42–46.

QUESTION PRESENTED

Whether Virginia's poll tax unreasonably burdens or otherwise infringes the constitutionally protected right to vote.

INTEREST OF THE UNITED STATES

In Section 10(b) of the Voting Rights Act of 1965 (see Appendix A, *infra*, p. 41), Congress has directed the Attorney General to institute "forthwith" appropriate proceedings in the name of the United States to declare unconstitutional the use of the poll tax to deny or abridge the right to vote in non-federal elections.[2] By this action, it has made plain its desire that this constitutional question be definitively resolved at the earliest possible opportunity. Such an occasion is presented by the instant case. Although instituted by private persons before the enactment of the Voting Rights Act, this case squarely raises the question whether payment of poll taxes may constitutionally be required as a condition of

[2] Requiring payment of poll taxes as a condition of voting in federal elections was outlawed by the Twenty-fourth Amendment, which provides (§ 1) that "[t]he right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax." See *Harman* v. *Forssenius*, 380 U.S. 528.

voting in non-federal elections, and it is ripe for decision by the Court now. The relevant legislative findings and declaration contained in Section 10(a) of the Voting Rights Act of 1965 are applicable to this suit, and may be noticed by this Court, albeit the lower court did not consider them. Cf. *Hines* v. *Davidowitz*, 312 U.S. 52, 60. No purpose would be served by postponing decision here to await the outcome of a suit originated by the United States. Indeed, to do so would thwart the end that Congress sought to achieve. Congress was aware that this case was pending, and one of the principal arguments made in favor of a congressional declaration that poll taxes were unconstitutional, rather than an outright prohibition, was the belief that the former approach would avert the likelihood of a remand by this Court. See 111 Cong. Rec. 9583, 9587, 9727, 9733 (daily ed.).

Since this litigation squarely presents an important question bearing upon the fundamental right to vote and there are in our view no compelling considerations of policy which call for a deferral of decision, we undertake to set forth the government's views.

STATEMENT

A. PROCEEDINGS BELOW

On March 17, 1964, appellants, four United States citizens, residents of Virginia, filed a complaint in the United States District Court for the Eastern District of Virginia on behalf of themselves and others similarly situated. They sought leave of the

court to prosecute the action *in forma pauperis* pursuant to 28 U.S.C. 1915 (R. 10–14); permission to do so was granted (R. 1). The defendants (appellees here) were officials responsible for the administration and enforcement of the State's laws relating to poll taxes. The complaint alleged that Virginia's constitutional and statutory provisions [3] requiring the payment of a poll tax as a precondition to registering to vote and to voting in State and local elections "discriminate against plaintiffs and other similarly situated, depriving them of their rights under the equal protection and due process clauses of the Fourteenth Amendment * * *" (R. 6). It further alleged that appellants and members of their class were unable to pay the poll tax and were thus prevented from registering to vote, and from voting, in non-federal elections solely because of their poverty. The complaint asked for declaratory and injunctive relief. The jurisdiction of the district court was invoked under the Fourteenth Amendment and 28 U.S.C. 1343 (3), 2201 and 2202. The right to maintain the suit was asserted under 42 U.S.C. 1983 (R. 2).

On April 13, 1964, appellees filed a motion to dismiss, asserting, among other things, that the complaint failed to state a claim upon which relief could be granted (R. 17–19). On May 26, 1964, appellants moved for leave to amend their complaint in order to challenge the Virginia constitutional and statutory provisions which disqualify "paupers" from register-

[3] These provisions are described in detail, *infra*, pp. 9–13.

ing to vote and from voting (R. 22–23).[4] This motion was subsequently granted (R. 23–24).

On October 21, 1964, a hearing was held before a statutory court of three judges convened in accordance with the prayer in the complaint (R. 6, 26). During the course of the hearing, counsel for the State acknowledged that appellees would be subject to challenge as "paupers" under Virginia law (R. 29–30). On November 10, 1964, the court issued a *per curiam* opinion holding that the constitutionality of the challenged provisions of Virginia law requiring payment of a poll tax as a precondition to registering to vote and to voting in State and local elections was not open to question in view of the decision of this Court in *Breedlove* v. *Suttles,* 302 U.S. 277 (R. 32–33). With regard to the "pauper" disqualification, the court noted that there had been no showing that either appellants or members of their class had been prevented from voting on that ground, and concluded that "an expression by us upon the meaning and implications of that term would be entirely academic and without place here" (R. 33). The court accordingly entered an order dismissing the complaint (R. 34).

B. THE OPERATION OF THE VIRGINIA POLL TAX

1. ORIGIN—THE VIRGINIA CONSTITUTIONAL CONVENTION OF 1901–1902

As this Court has noted (*Harman* v. *Forssenius,* 380 U.S. 528, 543), the original purpose of the Vir-

[4] This disqualification applies to both federal and State elections. Va. Const. § 23; 24 Va. Code § 18.

ginia poll tax requirement was to disfranchise Negroes. Under the Virginia Constitution in force between 1870 and 1902, all male citizens twenty-one years of age and older (except insane persons, persons convicted of disqualifying crimes, and persons who had violated their oaths of office by participating with the Confederacy in the Civil War) who satisfied residency requirements were eligible to register and to vote,[5] and during this period substantial numbers of Negroes exercised the franchise in Virginia.[6] A constitutional convention was convened in 1901, primarily to explore ways to disfranchise the Negro. The opening speech by the president of the convention expressed this dominant theme:

> [O]ur people have no prejudice or animosity against members of the colored race, but [we] believe * * * that the dominant party in Congress not only committed a stupendous blunder, but a crime against civilization and Christianity when, against the advice of their wisest leaders, they required the people of Virginia and the South * * * to submit to universal negro suffrage. (Applause.) [*Report of the Proceedings of the Constitutional Convention of Virginia,* p. 20.]

In a similar vein, it was stated:

> The chief purpose of this convention is to amend the suffrage clause of the existing Constitution. It does not require much prescience to foretell that the alterations which we shall

[5] See *The Federal and State Constitutions, Colonial Charters and Other Organic Laws*, Vol. 7, H. Doc. No. 357, 59th Cong., 2d Sess., pp. 3875–3876.

[6] See McDanel, *Virginia Constitutional Convention of 1901–1902* (1928), pp. 25–34.

> make will not apply to "all persons and classes without distinctions." We were sent here to make distinctions. We expect to make distinctions. We will make distinctions. [*Proceedings,* p. 14; see also *id.,* p. 290.]

Both suffrage plans submitted to the convention contained a poll tax provision,[7] avowedly to eliminate Negro voting. Thus, the committee report accompanying one of these plans stated:

> It will not do away with the negro as a voter altogether, but it will have the effect of keeping numbers of the most unworthy and trifling of that race from the polls. I do not know of anything better in view of the fifteenth amendment. [*Proceedings,* p. 604.]

And, while there was some feeling that more was needed than a poll tax to accomplish the disfranchisement of the Negro, it was generally agreed that a poll tax was a necessary part of any effective suffrage plan (see, *e.g., Proceedings,* pp. 2961–2962). Several delegates thought that the poll tax should not be linked with voting, but should be used to force Negroes to pay a greater share of the costs of public education. An overwhelming majority of the delegates refused to divorce the tax from the franchise. Recognizing that revenue-raising and Negro disfranchisement were inconsistent objectives (see, *e.g., Proceedings,* pp. 2863, 2870), and deeming the latter paramount, the Committee of Elections decided that the tax should not be legally enforceable during the

[7] A poll tax had first been adopted in Virginia by constitutional amendment in 1876. This provision was also aimed at Negroes, but it proved too great a source of fraud (through block purchases of votes), and was repealed in 1882. See McDanel, *supra,* at 6.

period when non-payment would result in disfranchisement—*i.e.*, for three years. Payment during this period had to be completely voluntary, because if Negroes were compelled by process of law to pay poll taxes, they would do so and thereby qualify to vote. An attempt to amend this proposal was soundly defeated, and a poll tax plan specifically designed to disfranchise the maximum number of Negroes and the minimum number of whites was approved by the convention. The poll tax provisions of the Virginia Constitution of 1902 remain in effect today; together with their implementing legislation, they are the subject of this case. We describe the salient features of the Virginia poll tax system in the next section.

2. THE STRUCTURE OF THE POLL TAX SYSTEM IN VIRGINIA

Section 173 of the Virginia Constitution directs the general assembly to levy an annual poll tax of $1.50[8] on every resident of the State twenty-one years of age and over, except persons pensioned by the State for military services. One dollar of the tax is to be applied by State authorities "exclusively in aid of the public free schools," and the remainder is to be returned to the counties for general purposes. Section 18 of the Constitution prescribes the following preconditions for voting in Virginia: (1) citizenship; (2) age twenty-one and over; (3) specified periods of resi-

[8] Since all assessable poll taxes for the three preceding years must be paid as a precondition to registering to vote and to voting, the total tax due from persons who are liable for the tax for the three preceding years but who have not previously paid is approximately $4.75 (including required interest; see 58 Va. Code §§ 963–964).

dence in the State, county and precinct; (4) registration; and (5) payment of poll taxes. Under Section 20, a person offering to register to vote must have "personally"[9] paid all State poll taxes assessed or assessable against him for the three years preceding the year in which he applies for registration.[10]

The poll tax must be paid at least six months prior to the election in which the voter seeks to vote (Va. Const. § 21). General elections for State, county, and some—but not all—city offices are held in November (24 Va. Code §§ 136, 160–168). Thus, instead of a single deadline for payment of poll taxes with respect to voting in all elections, there are different deadlines for different elections. For example, in order for an otherwise qualified resident of Richmond to vote for the Mayor of Richmond, he must pay his poll taxes by early January of the year of the election. On the other hand, if he is interested in voting only for Governor of the State, and if he is aware of the applicable deadline, he need not pay poll taxes until early in May, six months before the November election. Additional complications arise with respect to special elections (see 24 Va. Code § 22, Appendix A, *infra*, p. 44).

[9] The requirement that the tax be "personally" paid is satisfied only if payment "reduces his estate or means"; *i.e.*, it may not be paid "out of the means of another" (*Tilton* v. *Herman*, 109 Va. 503, 507, 508, 64 S.E. 351, 353; *Stokes* v. *Hatchett*, 18 Va. Law Reg. 251, 257 (Lunenburg County Circuit Court)), and the physical act of payment must be performed by the prospective voter, a member of his household, or a blood relative.

[10] Registration in Virginia is permanent, rather than annual.

The State has established no procedure for assessing poll taxes. Exclusive responsibility for such assessment rests with the Commissioners of the Revenue for the counties and cities. There is no uniform assessment procedure.[11] Those counties and cities that levy personal property taxes generally assess poll taxes at the same time, and the State has accordingly supplied a standard form for the return of local personal property taxes which includes a place for the recipient to indicate whether he is liable for the poll tax (see 58 Va. Code § 836). If he indicates on the return that he is liable, he is then billed for the poll tax as part of his personal property tax bill.[12] As a result of the method of assessment, a large number of persons liable for the tax are not assessed.[13] For

[11] The most current and reliable information concerning poll tax assessment procedures in Virginia was provided by Judge C. H. Morrissett, who has been State Tax Commissioner since 1926, in deposition proceedings on May 28, 1965, in *Shepheard* v. *Harrison*, an original mandamus proceeding in the Supreme Court of Appeals of Virginia. The case has since been voluntarily dismissed. The pertinent parts of the deposition are printed in Appendix C, pp. 50–61, *infra*.

[12] Assessments for State and local taxes are made as of January 1 of the assessment year (58 Va. Code § 4). County treasurers are required to mail tax bills to individual taxpayers not later than December 1 (58 Va. Code § 960); and, as a matter of practice, bills are usually mailed during October and November. Ogden, *The Poll Tax in the South* (1958), pp. 65–66. Payments become delinquent on December 5 of the tax year (58 Va. Code § 963).

[13] The 1960 Census indicates that there were approximately 2,312,887 persons twenty-one years of age and over in Virginia in 1960. See *1960 Census of Population*, Vol. 1, Part 48 (Virginia), Table 16. But Judge Morrissett testified (App. C, *infra*, p. 55) that in 1960 only 1,769,067 persons were assessed for poll taxes. See also Ogden, *supra*, p. 65.

such persons, the State has provided only that they may take the initiative and request to be assessed:

> Any person assessable with capitation taxes for any year or years, who has not been assessed therewith * * * may apply to the commissioner of the revenue for the county or city in which he resides and have himself assessed with such omitted capitation taxes * * *. The commissioner of the revenue shall assess such person * * * and give such person a certificate of such assessment. Thereupon the treasurer of the county or city * * * shall receive from such person the capitation taxes set out in such certificate. * * * [58 Va. Code § 1163.] [14]

Apparently Virginia does not enforce payment of delinquent poll taxes [15] by any means other than disfranchisement of those who do not pay. Indeed, Section 22 of the Virginia Constitution provides that

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[14] In *Smith* v. *Bell*, 113 Va. 667, 75 S.E. 125, it had been held, prior to the adoption of this provision, that persons who had not been assessed in regular course but who had actually made timely payment of poll taxes could vote. The court relied on the fact that the relevant constitutional provisions—Va. Const. §§ 20 and 21—speak of poll taxes "assessed or assessable."

[15] In 1960, there were 2,312,887 persons in Virginia over the age of 21, almost all of whom were liable for poll taxes. See *supra*, n. 13, p. 11. If all persons liable for the tax had paid for that year only (without regard to payments for the two preceding years), the State would have realized gross revenues of approximately $3,500,000. In fact, poll taxes produced only $1,706,000 in the fiscal year 1960—a Presidential election year—and this figure includes delinquent payments made in fiscal 1960 for prior years. See *Detail of State Tax Collections in 1960*, U.S. Bureau of the Census, G–SF60—No. 4 at 26. Bureau of the Census publications indicate that poll tax payments in the years 1955–1964 were not made by the majority of persons presumptively liable for the tax.

collection of delinquent poll taxes for a particular year may not be enforced by legal proceedings until the tax for that year has become three years delinquent. See *Campbell* v. *Goode,* 172 Va. 463, 2 S.E. 2d 456. In other words, collection of poll taxes for a particular year may not be enforced until after payment for that year has ceased to be a precondition of being allowed to vote (see pp. 8–9, *supra*).

ARGUMENT

Introduction and summary

It is settled that the power of the States to fix voting qualifications for State elections is subject to review by this Court for compliance with the standards of the Fourteenth Amendment. *Carrington* v. *Rash,* 380 U.S. 89; *Louisiana* v. *United States,* 380 U.S. 145. And, since the franchise is a fundamental right implicit in the First Amendment's guarantees of political expression and in other provisions of the Constitution as well, a State voting qualification challenged on the ground that it is discriminatory or unreasonable is subject to careful scrutiny. It must be free of the taint of discrimination. And it will be upheld only if there is a clear relationship between the requirement imposed and the only legitimate end which the Legislature may pursue—that of perfecting the electoral process as a means to representative government.

In the court below, appellants' primary attack upon Virginia's poll tax requirement was that it invidiously discriminates against poor persons, many of whom can pay the tax only with hardship, or not at all. We

believe that the challenged statutes are invalid on this ground. However, we also believe that there is a more fundamental issue presented—an issue framed in the complaint and preserved at every stage of the proceeding, although it has not been given primary emphasis in the proceedings to date.

That issue (to which our entire brief is devoted) [16] is whether *any* tax levied on voting, and carrying the sanction of disfranchisement for non-payment, is constitutionally permissible. We urge that it is not; that for all otherwise qualified voters (and not only those among them who are at the extreme of impoverishment) taxation on voting limits a fundamental right impermissibly; and that this is so because such taxation is wholly unnecessary to advance any legitimate State interest in fixing voting qualifications or otherwise regulating the electoral process. In our view, this basic vice of the poll tax system cannot be cured—as could, perhaps, a law that merely discriminated against poor persons—by exempting indigents from the burdens of the law. Nor would it be cured by reducing the amount of the tax assessed, or by eliminating the burdensome and rather treacherous procedures connected with its payment. The poll tax is invalid, we submit, not merely in its incidence and in the details of its administration, but in its conception; the principle of a tax on the right to vote is constitutionally indefensible.

[16] As indicated in the text, in our view this is the bedrock issue. In addition, it is evident that the issue of "equal protection" will be fully briefed by the parties.

Should the Court adopt the ground of decision urged here, a pressing constitutional issue—whether any manner or form of poll tax may be made a condition of the right to vote—will be definitively resolved without the necessity to re-examine *Breedlove* v. *Suttles,* 302 U.S. 277, and the cases following that decision. See *Butler* v. *Thompson,* 97 F. Supp. 17 (E.D. Va.), affirmed *per curiam,* 341 U.S. 937; *Pirtle* v. *Brown,* 118 F. 2d 218 (C.A. 6), certiorari denied, 314 U.S. 621; *Saunders* v. *Wilkins,* 152 F. 2d 235 (C.A. 4), certiorari denied, 328 U.S. 870. The only question actually discussed in the *Breedlove* opinion was whether the Fourteenth or Nineteenth Amendments forbade a State to exempt women from the poll tax. This Court, remarking that such a tax was bound to fall with unequal weight on different classes of the population, held that the State could constitutionally mitigate such inequalities. The Court implicitly rejected appellant's contention that the statute discriminated invidiously against poor persons merely because they (like women) might find it difficult to pay. But the ground we urge was neither argued to nor considered by the Court.

I. THE POWER OF THE STATES TO LIMIT THE FRANCHISE BY PRESCRIBING QUALIFICATIONS FOR VOTING IS CONFINED TO THE IMPOSITION OF REQUIREMENTS CLEARLY RELATED TO THE ACHIEVEMENTS OF REPRESENTATIVE GOVERNMENT

A. STATE VOTING QUALIFICATION LAWS MUST CONFORM TO THE STANDARDS OF THE FOURTEENTH AMENDMENT

The States have primary responsibility for assuring that the franchise is withheld from persons who are not likely to be responsible electors (see, *e.g.,* U.S.

Const., Art. I, § 2), and they have correspondingly broad and adequate powers to fix the qualifications of voters (*Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45, 50). We emphasize these propositions, and that we have no quarrel with them. Thus, a State may [11] deny the franchise to nonresidents, to those who do not register to vote, to those who have been convicted of crimes, to minors, and to others who the State may reasonably conclude are unfit to participate in its electoral processes. See *Pope* v. *Williams*, 193 U.S. 621; *Mason* v. *Missouri*, 179 U.S. 328; *Davis* v. *Beason*, 133 U.S. 333. But State power over suffrage, as in other areas of primary State responsibility, may be exercised only within the limitations prescribed by the Federal Constitution. With respect to State and local elections such limitations are found in a number of constitutional provisions specifically related to the franchise (the Fifteenth and Nineteenth Amendments and Section 2 of the Fourteenth Amendment), and in the general provisions of Section 1 of the Fourteenth Amendment—the basis in this case for challenging the constitutionality of Virginia's poll tax requirements.

That the validity of State-imposed voting qualifications could be challenged not only under the Suffrage Amendments, but under the Due Process and Equal Protection Clauses of the Fourteenth Amendment as well, was not certain until this Court's deci-

[11] At least, where there is no history of invidious discrimination, which otherwise reasonable voting qualification measures might perpetuate. See Section 4 of the Voting Rights Act of 1965.

sions last Term in *Carrington* v. *Rash*, 380 U.S. 89, and *Louisiana* v. *United States*, 380 U.S. 145, although earlier decisions had clearly foreshadowed this result. See *Nixon* v. *Herndon*, 273 U.S. 536; *Nixon* v. *Condon*, 286 U.S. 73; *Breedlove* v. *Suttles*, 302 U.S. 277; *Schnell* v. *Davis*, 336 U.S. 933, affirming *per curiam* 81 F. Supp. 872, 876 (S.D. Ala.); *Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45; *Reynolds* v. *Sims*, 377 U.S. 533, 554. In *Carrington*, a State statute excluding from the suffrage otherwise qualified resident members of the United States Armed Forces, unless they had acquired residence in the State prior to entering the service, was invalidated on the ground that the exclusion did not have a sufficient nexus with the aims of representative government and the function of the electoral process in achieving those aims. In *Lassiter*, *supra*, a State literacy test challenged on Fourteenth Amendment grounds (among others) was upheld by this Court on the express basis that such a test (at least, on its face) was related to the State's legitimate interest in an understanding electorate. Applying the *Lassiter* principle, the district court in *United States* v. *Louisiana*, 225 F. Supp. 353, 386 (E.D. La.), affirmed, 380 U.S. 145, held that a State-imposed requirement that a voter be able to read and interpret any provision of the State or Federal Constitution violated the Fourteenth Amendment, on the ground that it bore "no relation to reasonable voting requirements. * * * [T]here is just no correlation between an ability to interpret *any* section [many of the sections being exceedingly technical and complex] of the Louisi-

ana Constitution * * * and a legitimate State interest in an informed electorate." (*Ibid.;* emphasis in original.) This Court affirmed. *Louisiana* v. *United States, supra;* see, also, *Schnell* v. *Davis, supra.*

It is thus no longer open to doubt that the requirements of the Fourteenth Amendment are applicable to State laws prescribing qualifications for voting, and that such laws cannot withstand challenge under the Amendment if shown to lack sufficient relation or connection to a legitimate State concern.

B. BECAUSE THE RIGHT TO VOTE IS ONE OF THE FUNDAMENTAL PERSONAL LIBERTIES SECURED BY THE FOURTEENTH AMENDMENT AGAINST STATE ACTION, STATUTES LIMITING ITS EXERCISE SHOULD BE CLOSELY SCRUTINIZED

When a State abridges "fundamental personal rights and liberties * * * the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." *Schneider* v. *State,* 308 U.S. 147, 161. "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker,* 364 U.S. 479, 488.

The franchise is of course a fundamental personal right and an essential attribute of citizenship. *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370; *Reynolds* v. *Sims,* 377 U.S. 533, 554, 561–562. Its abridgment significantly encroaches on "fundamental personal liberties." Although the right to vote in State elections is nowhere expressly conferred in the Constitution,[18] it is implicit in a number of its provisions, including the First Amendment.

In its guarantees of free speech, assembly, and petition for redress of grievances, the First Amendment is a comprehensive charter of freedom of political expression. It embraces not only the rights explicitly enumerated, but additional rights, such as that of association for lawful objectives, necessary for their full exercise and enjoyment. See, *e.g., NAACP* v. *Alabama,* 357 U.S. 449; *NAACP* v. *Button,* 371 U.S. 415, 429–430. Voting is indisputably a form of political expression—no less a one than a petition to a State's legislature for a redress of political grievances, or association for lawful political objectives, or litigation by minority groups seeking equality of treatment. This Court in *Button* noted that "[g]roups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts" (371 U.S. at 429), and held that the State could not bar them from the courts for those purposes. No more may

[18] In contrast, the right to vote in federal elections is expressly conferred in Art. I, § 2 of the Constitution (see *United States* v. *Classic,* 313 U.S. 299, 314–315; *Ex parte Yarbrough,* 110 U.S. 651, 663–665), although the States have primary responsibility to establish voting qualifications in federal as well as State elections. See pp. 15–16, *supra.*

the States obstruct the primary route for the achievement of political objectives: the ballot. This is not to say that the States are required to submit every question of government to the electorate for determination. But insofar as a State does make the electoral process the method of determining its fundamental political questions, such as who shall exercise the executive and legislative powers of government, it curtails political expression if it denies its citizens the right to vote. And for most people voting is virtually the only practical form of political expression. The average citizen does not make political speeches, join political clubs, or write letters to newspapers. He expresses himself, in the political arena, only by casting his ballot.

The express First Amendment freedoms of political expression are not meaningful without a free and fair electoral process. There is little point in going out on the stump if the persons one exhorts are disfranchised; or in joining a political party if people cannot express their adherence to the principles of the party by voting for its candidates; or in otherwise expressing oneself politically if the basic institution for effecting political change by persuasion and consent rather than force or intimidation—the free election—does not exist. Moreover, "restrictions upon the right to vote," like "restraints upon the dissemination of information," "interferences with political organizations," and "prohibition of peaceable assembly," constitute a type of State action "which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legisla-

tion." *United States* v. *Carolene* [illegible] *Co.*, 304 U.S. 144, 152–153, n. 4. This Court has suggested that such restrictions should, on that account, "be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation" (*ibid.*). The ordinary political processes of the State cannot be relied upon as the exclusive means to correct unfairness or inequality in the franchise. A State legislature elected under a law that restricts or dilutes the franchise may have no incentive—indeed, it may have a strong disinclination—to repeal such a law and thereby broaden the franchise.

The right to vote is implicit in other provisions of the Constitution as well. Article I, Section 2 provides that the members of the House of Representatives shall be chosen by the "People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[19] Article IV, Section 4 provides that the "United States shall guarantee to every State in this Union a Republican Form of Government." The Fifteenth and Nineteenth Amendments abrogate the power of the States to deny the right to vote in State (as well as federal) elections to certain classes of citizens.[20] These provisions obviously contemplate representative State governments, in which legislative power resides in popu-

[19] The Seventeenth Amendment makes similar provision for the election of Senators.

[20] See also § 2 of the Fourteenth Amendment.

larly elected officials. They presuppose the right to vote as a basic civil right. Without popular suffrage in the State political systems, the Fifteenth and Nineteenth Amendments would be meaningless. Article I, Section 2 and the related provision of the Seventeenth Amendment would be rendered inoperative; it would be impossible to determine who may vote in congressional elections. And the Guarantee Clause would be violated. "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." *In re Duncan,* 139 U.S. 449, 461. "All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. * * * Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution." *Minor* v. *Happersett,* 21 Wall. 162, 175–176; see, also, *Baker* v. *Carr,* 369 U.S. 186, 242–244 (concurring opinion).

Since the right to vote is implicitly guaranteed by the Constitution, it is within " 'the area of protected freedoms,' " where the States may not regulate " 'by means which sweep unnecessarily broadly.' " *Griswold* v. *Connecticut,* 381 U.S. 479, 485, quoting *NAACP* v. *Alabama,* 377 U.S. 288, 307; see, also, *Kent*

v. *Dulles*, 357 U.S. 116, 125–127, 129. So this Court has expressly held in a closely related context: "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections. * * * The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims*, 377 U.S. 533, 554–555; and see *Wesberry* v. *Sanders*, 376 U.S. 1, 17; *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370. "Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims*, *supra*, at 562. It is true that the Court in these cases was referring to the right to vote of persons qualified under State law to vote. See *Gray* v. *Sanders*, 372 U.S. 368, 380–381. But the practical effect of arbitrarily denying the franchise to some persons (or diluting their vote), and of arbitrarily disqualifying them from voting, is the same. Just as the States have primary responsibility for apportioning their legislatures, so they have primary responsibility for determining voting qualifications; but in neither case may this power be used to deny the essential conditions of representative government—elections open on equal terms to all who are fit to participate in this most basic of political processes.

II. TAXATION OF VOTING IS NOT A LEGITIMATE EXERCISE OF STATE POWER TO FIX VOTING QUALIFICATIONS

A. THE CONGRESSIONAL FINDINGS, SET FORTH IN THE VOTING RIGHTS ACT OF 1965, ARE ENTITLED TO WEIGHT

This Court does not bear the sole responsibility for enforcing the requirements of the Fourteenth Amendment; Congress, by virtue of Section 5 of the Amendment,[21] shares this responsibility. See, *e.g.*, 42 U.S.C. 1981; *Pollock* v. *Williams*, 322 U.S. 4; *Buchanan* v. *Warley*, 245 U.S. 60; *Baldwin* v. *Franks*, 120 U.S. 678, 699–701 (dissenting opinion). Moreover, "a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect." *Block* v. *Hirsh*, 256 U.S. 135, 154; cf. *Atlanta Motel* v. *United States*, 379 U.S. 241, 252–253; *Katzenbach* v. *McClung*, 379 U.S. 294, 299–300, 303–304. In Section 10(a) of the Voting Rights Act of 1965 (79 Stat. 442) Congress, with evidence before it regarding the purpose and effects of the poll tax system in Virginia,[22] found that the requirement of the payment of a poll tax as a precondition to voting (1) "precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise," (2) "does not bear a reasonable relationship to any legitimate State interest in the conduct of elections," and (3) "in some areas has the purpose or

[21] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[22] See, *e.g.*, S. Rep. No. 162, 89th Cong., 1st Sess., Part 3, p. 33; H. Rep. No. 439, 89th Cong, 1st Sess., pp. 20–21; 111 Cong. Rec. 7617, 9570, 9572–9573, 9689 (daily ed.).

effect of denying persons the right to vote because of race or color." On the basis of these findings, Congress has declared in the same section "that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting."

For present purposes, finding (2)—the lack of a reasonable relationship between the poll tax and the State's legitimate interest in the conduct of elections—is the most pertinent. The basis of this finding is summarized in the House Report.[23] Findings similar to those contained in Section 10(a) had earlier been made by Congress in proposing the Twenty-fourth

[23] "* * * Nothing in the payment of a poll tax evidences one's 'qualification' to vote. A man with a million dollars in the bank cannot vote if he fails to pay the tax; a man who steals a couple of dollars to pay the tax has met this condition. A poll tax has nothing in common with true 'qualifications': Age (reflecting maturity of judgment); residency (reflecting knowledge of local conditions), etc. Once it is demonstrated that the poll tax cannot be justified as a qualification for voting fixed by the States under article I of the Constitution, good cause for this restriction on the right to vote is hard to find. No one seriously contends that it is a revenue measure. Forty-six States deem it unwise. * * * In their administration, no less than by their arbitrary restriction, these exactions lend themselves to notorious abuse. Some poll taxes must be paid in advance, by a specified date—or the right to vote lapses; cumulative charges have to be satisfied, perhaps pricing the vote out of the market for the indigent applicant. Surely, in the light of its recent expressions (see, *e.g.*, *Harman* v. *Forssenius*, October term, 1964 (decided Apr. 27, 1965)), the Supreme Court can be expected to recognize and strike down these arbitrary restrictions on the right to vote, particularly so when Congress has determined that their elimination is appropriate to the safeguard of the rights of citizens under the 14th and 15th amendments." H. Rep. No. 439, 89th Cong., 1st Sess., p. 22.

Amendment [24] (see n. 2, p. 3, *supra*); they were summarized by this Court in *Harman* v. *Forssenius*, 380 U.S. 528, where the Court found that Virginia had violated the Amendment by requiring a certificate of residence to be filed in lieu of poll taxes in federal elections (380 U.S. at 539–540):

> Even though in 1962 only five States retained the poll tax as a voting requirement, Congress reflected widespread national concern with the characteristics of the tax. Disenchantment with the poll tax was many-faceted. One of the basic objections to the poll tax was that it exacted a price for the privilege of exercising the franchise. Congressional hearings and debates indicate a general repugnance to the disenfranchisement of the poor occasioned by failure to pay the tax. * * * Another objection to the poll tax raised in the congressional hearings was that the tax usually had to be paid long before the election—at a time when political

[24] To be sure, the Twenty-fourth Amendment is applicable only to federal elections. No inference can be drawn from this limitation, however, that Congress believed that poll taxes were any less invidious as a precondition to voting in State elections. In enforcing the poll tax laws, the States had never differentiated between State and federal elections, and there was certainly no indication that the poll tax placed a lesser burden on the exercise of the State than the federal franchise. The Twenty-fourth Amendment was limited to federal elections as a matter of political compromise (House Report, *supra*, p. 23). Nor is there any basis to suppose that Congress or the ratifying States intended the Twenty-fourth Amendment to effect a silent repeal of the Fourteenth Amendment insofar as that Amendment might limit State power to tax the vote. Our study of the legislative history of the Twenty-fourth Amendment discloses no instance in which it was ever suggested that any such radical result was contemplated or might follow.

> campaigns were still quiescent—which tended to eliminate from the franchise a substantial number of voters who did not plan so far ahead. The poll tax was also attacked as a vehicle for fraud which could be manipulated by political machines by financing block payments of the tax. In addition, and of primary concern to many, the poll tax was viewed as a requirement adopted with an eye to the disenfranchisement of Negroes and applied in a discriminatory manner. * * *

The problem of the poll tax has been before the Congress for some years. Congress has studied it and concluded, with ample basis in fact and experience, that the poll tax is not a justifiable exercise of State power to establish voting qualifications.[25] Without going so far as to suggest that this judgment is binding upon the Court, we submit that it is entitled to great weight. As we show immediately below, the Court would in any event be required to reach the same conclusion independently.

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[25] It is true the Voting Rights Act does not, as such, outlaw poll taxes. But sound practical reasons dictated the alternative approach actually followed—a declaration of unconstitutionality coupled with a direction to the Attorney General to institute appropriate actions to enjoin State poll tax requirements. The Attorney General expressed concern that if Congress outlawed the poll tax, and this Court should later hold the Act of Congress to be unconstitutional, many people, relying on the Act and accordingly declining to pay their poll taxes, would find themselves unable to qualify to vote. See *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 6400*, 89th Cong., 1st Sess., Ser. 2, pp. 23, 107. The approach followed by Congress avoids that risk, while expressing its constitutional judgment as effectively as if it had enacted an express invalidation.

B. THE POLL TAX IS INVALID BECAUSE IT BEARS NO RELATIONSHIP TO THE STATE'S INTEREST IN REGULATING THE ELECTORAL PROCESS FOR THE PURPOSE OF PROMOTING REPRESENTATIVE GOVERNMENT

A poll tax is a license tax on voting. Anyone who wants to vote must pay the tax; anyone who does not want to vote—though technically he remains liable for the tax—need not pay it. The question is whether such a limitation on the franchise is constitutionally permissible. We think not. To be sure, the States have broad powers to regulate the franchise, but, since the right to vote is one of the fundamental personal liberties protected by the Constitution, those powers must be exercised precisely and circumspectly so as to limit the franchise no more than is clearly necessary to effectuate the State's legitimate and substantial interests. Taxing the vote, we demonstrate, is a method of limiting the franchise that falls far short of this standard, and is indeed so arbitrary a restraint on the exercise of a fundamental right as to offend elementary notions of due process of law.[26]

A State may deny the franchise to minors. Political responsibility is not to be expected of children, and though some children or teen-agers are more mature than some adults, the line must be drawn somewhere. The State may likewise disfranchise convicted criminals. Having disregarded the State's most basic laws, they may reasonably be deemed unfit to participate in the process for choosing the lawmakers and

[26] Needless to say, if a State wishes to impose a capitation tax for revenue-raising purposes, there can be no objection so long as it does not tie its levy to exercise of the franchise.

the law-enforcers. So, too, the State may deny the franchise to nonresidents, who typically lack a direct and substantial stake in the affairs of the State; and, in some circumstances at least, to illiterates, who may be thought inadequately equipped to understand the issues in an electoral contest. The State may also deny the vote to persons who fail to register in advance—because registration has been found to be an effective method of preventing electoral frauds, and also because it prevents persons who have no real interest in participating in the electoral process from casting an ill-considered ballot based on a last-minute decision to vote. And it was once thought (although we think the proposition no longer tenable; see p. 32, *infra*) that the vote could properly be limited to men of property,[27] on the theory that they were the most responsible element of the community. In all of these cases, there is (or was) at least an arguable relation between the measure limiting the franchise and the goal of representative government—government by officials elected by the State's responsible citizens. There is no such relation in the case of the poll tax.

At its inception, Virginia's poll tax had, as we have seen, only one purpose: to disfranchise the Negro (*Harman* v. *Forssenius*, 380 U.S. 528, 543; pp. 6–9, *supra*) in circumvention of the Fifteenth Amendment. Attempts to supply a different rationale are unconvincing, *ex post facto* rationalizations. It has been asserted that to condition the franchise on pay-

[27] The history of property qualifications for voting is comprehensively reviewed, Porter, *Suffrage in the United States* (1918) *passim*.

ment of a tax "limit[s] the right of suffrage to those who * * * [take] sufficient interest in the affairs of the State to qualify themselves to vote." *Campbell* v. *Goode*, 172 Va. 463, 466, 2 S.E. 2d 456, 457. This explanation is belied by the methods of assessment and collection (see pp. 10–12, *supra*). For those who are assessed for poll taxes along with personal property taxes, the poll tax is a (to most persons, negligible) $1.50 item buried in the general tax bill. As the leading student of the Virginia poll tax has noted, as a result of this method of assessment "some citizens pay the poll tax as an item of the general tax bill without realizing that they have done so and without bothering to qualify themselves further for voting." Ogden, *The Poll Tax in the South* (1958), p. 66. That a taxpayer may fail to deduct the amount of the poll tax from his bill is hardly evidence that he has "sufficient interest in the affairs of the State to qualify [himself] to vote." For those persons who are not assessed for poll taxes, the system is a series of pitfalls. Such a person receives no bill or other notice of when the tax is due. Yet to qualify to vote he must pay the tax six months in advance of the election—at a time, that is, when political activity is relatively quiescent and the actual election campaign has not begun.[28] This Court, as well as Congress (see n. 23, p. 25,

[28] Candidates for most major offices are required to declare their candidacies approximately thirty days prior to the May deadline for payment of poll taxes for voting in the November general election. 24 Va. Code §§ 349, 370. However, primary campaigns do not usually begin until *after* the May deadline for payment of poll taxes, and the actual campaign does not begin until long after.

supra), has recognized that the timing of the required payment places on a person who desires to vote the unreasonable burden of having to remember long before the election that he must take the initiative and pay his poll tax. *Harman* v. *Forssenius,* 380 U.S. 528, 539–540, 542; see pp. 26–27, *supra.* The burden is all the heavier since it is necessary to plan with respect to more than one election, falling on different days (see p. 10, *supra*). There is no single day for paying poll taxes to qualify for all forthcoming State and local elections. While the State has a legitimate concern with fostering an interested electorate, the poll tax system is too treacherous to provide a reliable means of separating out the uninterested. It "is not a test but a trap." *Louisiana* v. *United States,* 380 U.S. 145, 153.

In its practical impact, we have seen that the Virginia poll tax system imposes a negligible burden on the owner of personal property who is billed for poll taxes along with personal property taxes, and an unreasonable one on persons who, due to the vagaries of the assessment practices of the counties and cities, are not assessed for poll taxes at all. Such disparate treatment alone vitiates any contention that the poll tax is a method of limiting the electorate to those who are seriously interested in exercising the franchise. Nor can it be justified on the ground that the State may constitutionally limit the franchise to persons of property. In the first place, that is not the line drawn—except in a most fortuitous and haphazard manner—by the poll tax system. A person without property may still qualify to vote if he takes the initiative in paying his poll taxes, or if, though

not liable for any personal property tax, he indicates on his return that he is liable for poll tax and is billed for and pays that tax. A person of property may effectively be disfranchised if he lives in a county which levies no personal property tax and does not assess poll taxes. And while in some areas many persons are not assessed for poll taxes, there is some indication that in other areas an effort is made to assess everyone specially for such taxes. Ogden, *supra*, p. 66. In short, there is no rational pattern in the assessment of poll taxes.

In the second place, however it may have been viewed in an earlier era, restricting the franchise to the propertied or financially able can no longer be justified on the theory that there is a reliable and demonstrable relationship between the possession of monetary means and the attributes of responsible citizenship. "Diluting the weight of votes because of place of residence [within the State] impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as * * * economic status." *Reynolds v. Sims*, 377 U.S. 533, 566. "[A]ll who participate in the election are to have an equal vote * * * whatever their income * * *." *Gray* v. *Sanders*, 372 U.S. 368, 379. "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." *Reynolds* v. *Sims, supra*, at 562. To favor the property owner is to inject "economic interests" into the electoral process and make income a voting qualification, contrary to the decisions of this Court.

Even if Virginia were to amend its laws to provide a uniform assessment method for all persons, the poll tax still could not be defended as a *bona fide* method for separating interested from uninterested prospective voters. Payment of a sum of money—especially long before the election campaign begins—is not a reliable token of interest in the electoral process. To a person who is assessed $1.50 as part of a larger tax bill, the poll tax is, as we have seen, no evidence of interest in the electoral process. But to an impoverished person, of no property and no financial means, a special assessment of $1.50 could well deter exercise of the franchise. A system that bases voting qualification on the payment of money, even an amount which to the average person is nominal, has built into it inequalities which bear no relationship to the State's legitimate concern with fostering a responsible electorate. However the tax be measured, and whatever its amount, the inevitable tendency is to place unequal burdens on persons who may be equally responsible electors; as this Court has made clear, the time is past when income or property could reasonably be considered an index of civic responsibility. Nor would this vice be cured by exempting poor persons from the tax. To enforce such an exemption, it would be necessary to require evidence of poverty, and the furnishing of such evidence would itself constitute a burden on the exercise of the franchise. The short of it is that financial ability has no place in a test of voting eligibility; in our democratic society, it is irrelevant to a determination whether a person is fit to vote. The States, therefore, may not, consist-

ently with the Fourteenth Amendment, use any financial criterion—as is inherent in the poll tax—in their voting qualification requirements.[29]

Taxation as a method of voting qualification has additional infirmities. It is peculiarly susceptible to fraud. *Harman* v. *Forssenius, supra,* at 540; pp. 27, *supra.* A political machine can manipulate the electoral process by financing block payments of the poll tax. It is to minimize this danger, it has been argued, that the State must make the tax due so far in advance of the election.[30] But the result of so doing, as we have seen, is that many citizens lose the vote through inadvertence.

Not only is taxation an inherently ill-suited method for regulating the franchise in a manner consistent with the goals of representative government; superior methods are available and are widely used. The normal means of assuring that the franchise is confined to those who have demonstrated a responsible interest in its exercise is to require registration to vote. Under the registration system, the voter must formally express a desire to vote and undergo a registration procedure far less perfunctory than that of being

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[29] Assuming that limiting the franchise to taxpayers would be any less objectionable, this defense would not be open to the State here since it is plain that most persons who do not or cannot pay poll taxes pay other State taxes—*e.g.*, sales and other indirect taxes. And a person could pay his poll taxes and qualify to vote though he paid no other taxes.

[30] The requirement that poll taxes be paid far in advance of the election—a requirement common to the States of Virginia, Alabama, Mississippi, and Texas—arose in part from a desire to prevent block payments of poll taxes by corrupt politicians on the eve of the election. See Ogden, *supra*, at 44–52.

assessed an annual poll tax as part of a general tax bill. The procedure is sufficiently demanding to discourage the uninterested from qualifying to vote, without being "calculated * * * to lay springes for the citizen" (*Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45, 54), or place unequal burdens on different classes, or inject irrelevant economic criteria. Virginia requires voter registration. It has not shown why additional proofs of voter interest are necessary, or how the poll tax system can fairly be said to provide such proofs.

The poll tax has also been defended (see references in *Harmon* v. *Forssenius, supra*, at 542, n. 21) on the ground that it provides a simpler method than annual registration for insuring that the voter is a *bona fide* resident of the State. The State has an interest in limiting the franchise to residents, and, therefore, in procedures that enable a reliable determination whether a prospective voter is a resident. But to determine residency, it is neither necessary nor appropriate to require payment of a sum of money. There is no relationship between paying a special tax on voting and proving residence, as this Court has recognized in expressly rejecting the contention that taxing the vote is a proper measure to insure "that the electorate is limited to bona fide residents." *Harman* v. *Forssenius,* 380 U.S. 528, 543. "[N]umerous devices [are available] to enforce valid residence requirements—such as registration, use of the criminal sanction, purging of registration lists, challenges and oaths, public scrutiny by candidates and other interested parties" (*ibid.*). None of them has the

same inherent inadequacies and inequities as the poll tax system. It may be somewhat easier to administer than some of the other methods, but a fundamental right may not be limited on the ground of "some remote administrative benefit to the State." *Id.* at 542, citing *Carrington* v. *Rash,* 380 U.S. 89, 96.

Finally, the poll tax system cannot be defended on the ground that it provides a legitimate method of raising money for public education or other lawful purposes.[31] The State itself does not regard the poll tax in this light. The poll tax was not adopted as a revenue measure;[32] the State's legal authority to collect the tax (otherwise than by disfranchisement) is severely limited, and in any event not exercised (see pp. 12–13, *supra*); and the revenue it produces is negligible.[33] Moreover, the fact that the State has a legitimate interest in raising revenue by taxation does not mean that it is justified in using disfranchisement as a method of tax collection. It is clear that a State

[31] Under Va. Const. § 173, $1.00 of the $1.50 poll tax is allocated to the public schools. The remaining $.50 is remitted to the counties for general purposes. See p. 9, *supra.*

[32] The Virginia Supreme Court of Appeals said in *Campbell* v. *Goode*, 172 Va. 463, 466, 2 S.E. 2d 456, 457, that the State's poll tax "was not intended primarily for the production of revenue."

[33] For example, in 1964, total poll tax revenues allocable to public education in Virginia comprised less than one half of one percent of the total revenues for public education for the school year 1963–1964. Total poll tax revenue for 1964 was $1,826,000, two-thirds of which was allocable to the public schools. *State Tax Collections in 1964*, U.S. Bureau of the Census, G–SF64–No. 3 at p. 12. Total revenues for public education for the school year 1963–1964 were $444,282,209. *Annual Report of the Superintendent of Public Instruction*, 1963–1964 at p. 236.

can raise all the revenue it needs without having to tax the vote—as witness the experience of the 46 States that levy no poll taxes. Since disfranchisement is not a necessary, usual, or appropriate method of tax collection, using it to raise revenue would present a clear case of abridging a fundamental right unenecessarily. See *Shelton* v. *Tucker,* 364 U.S. 479; p. 18, *supra.*

The same result would follow, we think, even if poll tax revenues were used to defray the costs of elections or of representative government generally. Again, the experience of the vast majority of the States makes clear that such a measure is not necessary to support the expenses of representative government. Moreover, democratic government benefits every citizen. Imposing a disproportionate share of its costs on those who exercise the basic right of citizenship—the franchise—would discriminate against the people who are discharging their public responsibilities and in favor of those who are not; discourage the exercise of the franchise generally; and thereby, we submit, unreasonably and therefore impermissibly abridge the right to vote. It is not a proper exercise of the taxing power to impose special charges on persons exercising their fundamental rights. *Murdock* v. *Pennsylvania,* 319 U.S. 105; pp. 39–40, *infra.*

C. IN THE LIGHT OF PRESENT KNOWLEDGE, THERE CAN BE NO BASIS FOR A CLAIM THAT THE POLL TAX DOES NOT LIMIT THE RIGHT TO VOTE

Before the Twenty-fourth Amendment abolished the poll tax as a requirement in federal elections, it was

not altogether clear how great an impact the system had on the franchise in the States where such taxes were imposed. But there was evidence that the impact was substantial. "Since such States as Florida, Tennessee, South Carolina, and Georgia have abolished * * * [the poll tax], several of these States have reported an increase in registration and voting. It is interesting to note that these five States which still require payment of a poll tax were among the seven States with the lowest voter participation in the 1960 presidential election." H. Rep. No. 1821, 87th Cong., 2d Sess., p. 3. The adoption of the Twenty-fourth Amendment has provided dramatic confirmation that the poll tax is indeed a substantial barrier to voting. Although the nationwide percentage of persons voting declined in the 1964 as compared with the 1960 Presidential election, it increased substantially in each of the five States which required poll taxes in 1960 but—as a result of the Twenty-fourth Amendment—not in 1964. We document this assertion in Appendix B, *infra*, pp. 47–49, and we submit, further, that our analysis of the practical workings of the Virginia poll tax (pp. 30–33, *supra*) demonstrates that the inherent effect of the system is to limit the franchise and that such effect is likely to be appreciable.

Although we have pointed to unmistakable evidence that poll taxes work a substantial deprivation of protected rights, statistical demonstration is actually quite unnecessary. A license by its very nature restricts the activity licensed, and abridges the right to engage in it. The poll tax laws are, as noted, earlier,

a licensing scheme. No one may vote who does not pay the tax. In *Staub* v. *City of Baxley*, 355 U.S. 313, a city ordinance required a permit to be obtained from city officials before anyone could solicit membership in any dues-paying organization. Appellant, an organizer for a labor union, was arrested for having solicited without a permit. She contended that the permit requirement was unconstitutional as a restraint on freedom of speech. This Court held that she was entitled to raise the constitutional question although she herself had not first applied for (and hence had not been denied) a permit under the challenged ordinance. She might in fact have been granted a permit without difficulty; but she could not be required to submit to a licensing procedure that did not measure up to constitutional standards.

Similarly, a person who refuses to pay poll taxes on the ground that the State is without power to impose such a condition on the right to vote need not show that he cannot afford to pay the tax or that he finds it otherwise impracticable or inconvenient to comply with the poll tax laws. The State may not, at least without demonstrating an exigent need, "impose a charge for the enjoyment of a right granted by the Federal Constitution" (*Murdock* v. *Pennsylvania*, 319 U.S. 105, 113)—even a charge that, to some persons, is purely nominal. For it is immaterial "that proof is lacking that these license taxes either separately or cumulatively have restricted or are likely to restrict petitioners' * * * activities. On their face they are a restriction of the free exercise of those freedoms which are protected by the First Amend-

ment." *Id.* at 114; see, also, *Jones* v. *Opelika*, 319 U.S. 103.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be reversed.

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APPENDIX A

Section 10 of the Voting Rights Act of 1965 (79 Stat. 442–443) provides in pertinent part:

> (a) The Congress finds that the requirement of the payment of a poll tax as a precondition to voting (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise, (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color. Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.
>
> (b) In the exercise of the powers of Congress under section 5 of the fourteenth amendment and section 2 of the fifteenth amendment, the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting, or substitute therefor enacted after November 1, 1964, as will be necessary to implement the declaration of subsection (a) and the purposes of this section.
>
> (c) The district courts of the United States shall have jurisdiction of such actions which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States

Code and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

* * * * *

Sections 20, 21, 22, 35, and 38 of the Virginia Constitution, as amended, provide in pertinent part:

Section 20

Every citizen of the United States, having the qualifications of age and residence required in section eighteen, shall be entitled to register, provided * * * that he has personally paid * * * all State poll taxes legally assessed or assessable against him for the three years next preceding that in which he offers to register * * *.

Section 21

A person registered [to vote] * * * shall have the right to vote for all officers elective by the people * * * [provided that] he shall, as a prerequisite to the right to vote, personally pay, at least six months prior to the election, all State poll taxes assessed or assessable against him * * * during the three years next preceding that in which he offers to vote. * * *

Section 22

* * * The collection of the State poll tax assessed against anyone shall not be enforced by legal process until the same has become three years past due.

Section 35

No person shall vote at any legalized primary election for the nomination of any candidate for office unless he is at the time registered and qualified to vote at the next succeeding election.

Section 38

The treasurer of each county and city shall, at least five months before each regular election, file with the clerk of the circuit court of his county, or of the corporation court of his city, a list of all persons in his county or city who have paid not later than six months prior to such election, the State poll taxes required by this Constitution during the three years next preceding that in which such election is held; which list * * * shall state the white and colored persons separately, and shall be verified by the oath of the treasurer. The clerk, within ten days from the receipt of the list, shall make and certify a sufficient number of copies thereof, and shall deliver one copy for each voting place in his county or city, to the sheriff of the county or sergeant of the city, whose duty it shall be to post one copy, without delay, at each of the voting places * * *; the clerk shall * * * also cause the list to be published in such other manner as may be prescribed by law. * * *

Within thirty days after the list has been so posted, any person who shall have paid his capitation tax, but whose name is omitted from the certified list, may * * * apply to the circuit court of his county, or corporation court of his city, or to the judge thereof in vacation, to have the same corrected and his name entered thereon, which application the court or judge shall promptly hear and decide.

The clerk shall deliver, or cause to be delivered, with the poll books, at a reasonable time before every election, to one of the judges of election of each precinct of his county or city, a like certified copy of the list, which shall be conclusive evidence of the facts therein stated for the purpose of voting. * * *

Sections 17, 22, 67, 120, 124 and 367 of Title 24 (Elections) of the Virginia Code provide in pertinent part:

Section 17

Every citizen of the United States twenty-one years of age, who has been a resident of the State one year, of the county, city or town, six months, and of the precinct in which he offers to vote thirty days next preceding the election, in which he offers to vote, has been duly registered, and has paid his State poll taxes, as required by law, and is otherwise qualified, under the Constitution and laws of this State, shall be entitled to vote for members of the General Assembly and all officers elective by the people. * * *

Section 22

The qualifications of voters at any special election shall be such as are hereinbefore prescribed for voters at general election, but at any such special election, held before the second Tuesday in June in any year, any person shall be qualified to vote who was so qualified at the last preceding regular November election, or who is otherwise qualified to vote, and has personally paid, at least six months prior to the second Tuesday in June of that year, all State poll taxes assessed or assessable against him during the three years next preceding that in which such special election is held, and at any such special election, held on or after the second Tuesday in June in any year, any person shall be qualified to vote who is or was qualified to vote at the regular election held on the Tuesday after the first Monday in November of that year. The term "special election" as used in this section shall be deemed to include such elections as are held in pursuance of any special law, and also such as are held to fill a vacancy in any office, whether the same be filled by any qualified voters of the State, or of any county, city, magisterial district or ward.

Section 67

Each registrar shall register every citizen of the United States, of his election district, who shall apply to be registered at the time and in the manner required by law, who shall be twenty-one years of age at the next election, who has been a resident of the State one year, of the county, city, or town six months, and of the precinct in which he offers to register thirty days next preceding the election, who, at least six months prior to the election, has paid to the proper officer all State poll taxes or assessed or assessable against him for three years next preceding such election, or if he come of age at such time that no poll taxes shall be assessable against him for the year preceding the year in which he offers to register, has paid one dollar and fifty cents in satisfaction of the first year's poll tax assessable against him.

Section 120

The treasurer of each county and city shall, at least five months before the second Tuesday in June in each year in which a regular June election is to be held in such county or city, and at least one hundred and fifty-eight days before each regular election in November, file with the clerk of the circuit court of his county or the corporation court of his city a list of all persons in his county or city who have paid not later than six months prior to each of such dates the State poll taxes required by the Constitution of this State during three years next preceding that in which such election is to be held, which list shall state the white and colored persons separately, and shall be verified by the oath of the treasurer. * * *

Section 124

The clerk shall deliver, or cause to be delivered, with the poll books at a reasonable time before every election, to one of the judges of election of each precinct in his county or city, a like certified copy of the list, which shall be

conclusive evidence of the facts therein stated for the purpose of voting. * * *

Section 367

All persons qualified to vote at the election for which the primary is held, and not disqualified by reasons of other requirements in the law of the party to which he belongs, may vote at the primary * * *.

APPENDIX B[1]

(Numbers in thousands)

COMPARATIVE VOTING STATISTICS—1960–1964

The nationwide percentage of persons of voting age voting in the 1964 presidential election declined 2 percent from the comparable percentage for the 1960 presidential election. On a state-by-state basis, the percentage of voting-age persons voting in the 1964 presidential election as compared with the 1960 election declined in 32 states, remained unchanged in 6 states, and increased in 12 states, as shown in the following table:

State	1960			1964			
	Voting Age Population	Total Votes Cast	Percent Voting Age Population Voting	Voting Age Population	Total Votes Cast	Percent Voting Age Population Voting	Percentage Change in Proportional Number of Votes Cast
Alabama	1,834	570	31	1,915	690	36	5
Alaska	134	61	45	138	67	49	4
Arizona	732	398	55	879	481	55	0
Arkansas	1,043	429	41	1,124	560	50	9
California	9,660	6,507	67	10,916	7,058	65	−2
Colorado	1,031	736	71	1,142	777	68	−3
Connecticut	1,891	1,223	76	1,698	1,219	71	−5
Delaware	267	197	73	283	201	72	−1
Florida	3,088	1,544	50	3,516	1,854	52	2
Georgia	2,410	733	30	2,636	1,130	44	14
Hawaii	360	185	51	395	207	52	1
Idaho	372	300	80	386	292	75	−5
Illinois	6,281	4,757	75	6,358	4,703	74	−1
Indiana	2,778	2,135	76	2,826	2,092	75	−1
Iowa	1,664	1,274	77	1,638	1,185	73	−4
Kansas	1,322	929	70	1,323	858	64	−6
Kentucky	1,898	1,124	59	1,976	1,046	52	−7
Louisiana	1,804	808	44	1,893	896	48	4
Maine	581	422	72	581	381	65	−7
Maryland	1,845	1,055	57	1,995	1,116	55	−2
Massachusetts	3,245	2,469	76	3,290	2,345	72	−4
Michigan	4,580	3,318	72	4,647	3,203	68	−4
Minnesota	2,001	1,542	77	2,024	1,554	77	0

[1] *Population of Voting Age and Votes Cast for President, 1964 and 1960*, U.S. Department of Commerce, Bureau of Census, Ser. P–23, No. 14, Table 1.

State	1960			1964			
	Voting Age Population	Total Votes Cast	Percent Voting Age Population Voting	Voting Age Population	Total Votes Cast	Percent Voting Age Population Voting	Percentage Change in Proportional Number of Votes Cast
Mississippi	1,171	298	25	1,243	409	32	7
Missouri	2,606	1,934	71	2,696	1,818	67	−4
Montana	389	278	71	399	279	69	−2
Nebraska	858	613	71	877	584	67	−4
Nevada	175	107	61	244	135	56	−5
New Hampshire	373	296	79	396	288	72	−7
New Jersey	3,861	2,773	72	4,147	2,847	68	−4
New Mexico	501	311	62	514	328	63	1
New York	10,881	7,291	68	11,330	7,166	63	−5
North Carolina	2,557	1,369	53	2,753	1,425	51	−2
North Dakota	355	278	78	358	258	72	−6
Ohio	5,839	4,162	71	5,960	3,969	66	−5
Oklahoma	1,416	903	63	1,493	932	63	0
Oregon	1,073	776	72	1,130	786	70	−2
Pennsylvania	7,100	5,007	70	7,080	4,823	68	−2
Rhode Island	540	406	75	568	390	68	−7
South Carolina	1,206	387	31	1,380	525	39	8
South Dakota	392	306	78	404	293	72	−6
Tennessee	2,003	1,053	51	2,239	1,144	51	0
Texas	5,534	2,312	41	5,922	2,627	44	3
Utah	468	375	81	522	401	76	−5
Vermont	231	167	73	240	163	67	−6
Virginia	2,313	771	34	2,541	1,042	41	7
Washington	1,718	1,242	72	1,759	1,258	72	0
West Virginia	1,083	838	77	1,053	792	75	−2
Wisconsin	2,354	1,729	73	2,391	1,692	70	−3
Wyoming	190	141	74	195	143	74	0

As the foregoing table shows, the percentage of persons of voting age who voted in the 1964 presidential election increased substantially over the percentage who voted in the 1960 election—despite the nationwide decline—in each of the five states—Alabama, Arkansas, Mississippi, Texas, and Virginia—that required payment of a poll tax as a prerequisite to voting in the 1960 and prior presidential elections, but which, under the Twenty-fourth Amendment, could not require poll tax payments in the 1964 presidential election. The percentage increases in these poll tax states were as follows:

State	1960			1964			
	Voting Age Population	Total Votes Cast	Percent Voting Age Population Voting	Voting Age Population	Total Votes Cast	Percent Voting Age Population Voting	Percentage Change in Proportional Number of Votes Cast
Alabama	1,834	570	31	1,915	690	36	5
Arkansas	1,043	429	41	1,124	560	50	9
Mississippi	1,171	298	25	1,243	409	32	7
Texas	5,834	2,312	41	5,922	2,627	44	3
Virginia	2,313	771	34	2,541	1,042	41	7

The increases in the percentages of voting age persons voting in the seven remaining states are as follows:

State	1960			1964			
	Voting Age Population	Total Votes Cast	Percent Voting Age Population Voting	Voting Age Population	Total Votes Cast	Percent Voting Age Population Voting	Percentage Change in Proportional Number of Votes Cast
Alaska	134	61	45	138	67	49	4
Florida	3,088	1,544	50	3,516	1,854	52	2
Georgia	2,410	733	30	2,636	1,139	44	14
Hawaii	360	185	51	395	207	52	1
Louisiana	1,804	808	44	1,893	896	48	4
New Mexico	501	311	62	514	328	63	1
South Carolina	1,266	387	31	1,380	525	39	8

The percentage increases in Alaska, Hawaii, and New Mexico are not especially significant in view of the small populations of these states. The highest percentage increase—14 percent in Georgia, which has no poll tax requirement—may be attributed largely to the abolition of the county-unit system between 1960 and 1964 (see *Gray* v. *Sanders*, 372 U.S. 368), which probably resulted in a far heavier urban vote in that State. For example, in Fulton County, Georgia, of which Atlanta is the seat, the total number of votes cast increased 34%, from 109,743 to 166,745.

APPENDIX C

Testimony of Virginia State Tax Commissioner

Q. Judge Morrissett, for the record, state your full name.

A. Carlisle Havilock Morrissett.

Q. And your position with the State of Virginia?

A. State Tax Commissioner.

Q. How long have you held that position?

A. Since April, 1926. [P. 2.]

* * * * *

Q. Judge, who assesses that tax on behalf of the State?

A. The Commissioners of the Revenue of the Counties and Cities of the State.

Q. Are they doing it as agencies of your Department?

A. No, sir, not as agents of the Department of Taxation. They derive their powers directly from the Statutes.

Q. Whose duty is it to prescribe assessment methods for them?

A. The Department of Taxation prescribes forms for the assessment of the State Capitation Tax, the forms provide for the procedure; for example, the form for the return of tangible personal property for local taxation, the form prescribed by the State as the standard form, has always had on it a place in which a person would indicate whether or not he believed he was assessable with the State Capitation Tax. [Pp. 4–5.]

* * * * *

Q. Judge, has your Department, during your tenure of office, at any time made an examination to see how many people twenty-one years of age, residing in Virginia, were not being assessed with the Capitation Tax?

A. The Department of Taxation, so far as I know, has never made any study of that particular question.

Q. Is it mandatory that everyone twenty-one years of age who is domiciled in Virginia as of January 1st be assessed, with the two exceptions you mentioned?

A. Except those exempt by the Constitution or By-laws.

Q. Has the Department of Taxation ever issued any specific instructions to the Commissioners of Revenue relating to the assessment of a Capitation Tax so as to establish a uniform system of assessment?

A. No specific instructions have been issued to Commissioners of the Revenue on the ground that the law has been and is so plain as to speak for itself.

Q. Judge Morrissett, as Tax Commissioner of the State of Virginia, if you find that a local Commissioner of Revenue is not complying with the law concerning assessment of any tax, but specifically the Capitation Tax, do you have the power to direct him to carry out his duties in that respect?

A. I have the power to instruct him to carry out his State duties.

Q. Judge Morrissett, I do not know whether you have had an opportunity to examine the United States Census of Population for 1960 for the State of Virginia as being numbered PC(1)48D. Among statisticians they call it the "One Striper" since it has four white stripes in the upper left-hand corner. On page 48–315 that Census has indicated there were 2,304,288 persons in Virginia in 1960 that were twenty-one years of age or over, some of these people

including Military people who were in the Military but the total number added up to that figure. Have you had a chance to check the accuracy of that total?

A. I have examined the publication referred to and the figure of 2,304,288, as taken from Page 48–315 of the publication, is the figure given therein, but, Mr. Howell, on that point may I make this statement? The publication itself gives the bases on which these figures were compiled and the following explanatory paragraphs are taken from the above-mentioned publication:

"Detailed Characteristics, General, first paragraph, Page V"

"This report presents detailed categories and cross-classifications on the social and economic characteristics of the persons enumerated in the Eighteenth Decennial Census of Population, taken as of April 1, 1960. *All of these statistics are based on a 25-percent sample of the population.* The report contains data on the following subjects: Farm or nonfarm residence, color or race, nativity and parentage, place of birth, country of origin of the foreign stock, residence in 1955, school enrollment, level and type of school, years of school completed, veteran status of civilian males, marital status, whether married more than once, household relationship and unrelated individuals by type, persons in group quarters, families and subfamilies, number of own children, number of children ever born, employment status, hours worked, weeks worked in 1959, year last worked, occupation, industry, class of worker, earnings in 1959, income in 1959, place of work, and means of transportation to work."

A. (continuing) Now that is not very relevant, but this is:

> *"Information on age, sex, race, relationship to head of household, and marital status was collected on a complete-count basis, but the data for these five items shown in this report are based only on persons in the sample."* (Underscoring supplied.)

A. (continuing) Now this is the pertinent relationship. Now the first pertinent point was that all of these statistics are based on the 25-percent sample of the population.

Q. Judge, I don't want to interrupt you but do you mean that the statistics for the City of Richmond or Norfolk are based on 25%?

A. Only what is stated here, "Information on age, sex, race, relationship to head of household, and marital status was collected on a complete-count basis, but the data for these five items shown in this report are based only on persons in the sample." There is one other point to be brought out here and that is about persons in the Armed Forces. This is in the third and fourth paragraphs, Page VII:

> "Persons in the Armed Forces quartered on military installations were enumerated as residents of the States, counties, and minor civil divisions in which their installations were located. Members of their families were enumerated where they actually resided. As in 1950, college students were considered residents of the communities in which they were residing while attending college. The crews of vessels of the U.S. Navy and of the U.S. Merchant Marine in harbors of the United States were counted as part of the population of the ports in which their vessels were berthed on April 1, 1960. Inmates of institutions, who ordinarily live there for long periods of time, were counted as inhabitants of the place in which the institution was located, whereas patients in general hospitals, who ordinarily re-

main for short periods of time, were counted at, or allocated to, their homes. Persons without a usual place of residence were counted where they were enumerated.

"Persons staying overnight at a mission, flophouse, jail, detention center, reception and diagnostic center, or other similar place on a specified night (for example, April 8 in some areas) were enumerated on that night as residents of that place."

By Mr. HOWELL:

Q. Are you familiar with the fact that a school census is taken in every political subdivision in the State of Virginia every five years, according to the law?

A. That is the law of the State.

Q. Have you ever requested, as Commissioner of the Revenue, that the takers of that census put an extra column in order to ascertain the number of people residing in Virginia who are twenty-one years of age or older?

A. The school census, as I understand it, are not taken by Commissioners of the Revenue but by enumerators appointed by the local School Board or the Superintendent.

Q. Has anything ever been done by the Department of Taxation to determine from year to year the number of people that are twenty-one years of age or over in order to check on whether or not the mandatory law of assessment is being complied with?

A. Nothing has ever been done by the Department of Taxation as to checking into the matter that has been mentioned.

Q. Judge Morrissett, have you had an opportunity to check Page 16, Table 13 of the Report of your Department to the Governor of Virginia for the fiscal year ending June 30, 1961?

A. I have.

Q. And having heretofore suggested, through a certain court pleading, that this report contain the assessment of Capitation Taxes for the year 1960, could you tell us if this report does contain the Capitation Tax assessed for the year 1960?

A. It does.

Q. And I notice that on Page 16, Table 13, is indicates that $2,653,601.00 was the total assessment, exclusive of penalties and interest, that was made in Virginia for the year 1960; have you had an opportunity to check that for accuracy?

A. The figures taken from the Annual Report of the Department of Taxation for the fiscal year ending June 30, 1961 are correct. The arithmetical computation is correct.

Q. That is, we can determine the number of people actually assessed the Capitation Tax by dividing that sum by $1.50?

A. That is true.

Q. The quotient arrived at is 1,769,067 people?

A. That is correct.

Q. And the difference between the number of people assessed and the total population assigned to Virginia for persons twenty-one years of age or over subject to such imperfections as may be established in the census report would indicate a difference of 535,221 people? Before you explain, is that a correct subtraction according to your computation?

A. The figure of 535,221 cannot be admitted because—or that inference cannot be correctly drawn, in my opinion, because of the manner in which the census was taken, because of persons in the Armed Forces being exempt from the State Capitation tax and because of the other exemptions in the law. [Pp. 6–13.]

* * * * *

Q. You, yourself, have no knowledge of how many people twenty-one years of age or over are actually subject to the mandatory assessment?

A. In my opinion no accurate figure can be given by anyone.

Q. Have you ever asked the Bureau of Population at the University of Virginia, which is a State Agency, to determine that?

A. I have never requested them. I am sure that the Bureau of Census has done its best to compile accurate statistics but there are infirmities in them, as we have pointed out.

Q. You have no reason to believe that the census involves as much as half a million people, do you?

A. There are undoubtedly some people who are not being assessed with the State capitation tax.

Q. Who should be?

A. To make a statement to the contrary would not be reasonable. We all know that some people are not being assessed but it is also true that complete coverage would be quite beyond human accomplishment.

Q. But nothing is being done to actually obtain a head count of those people twenty-one years of age or over in Virginia?

A. Not by the Department of Taxation.

Recross examination by Mr. HARRIS:

Q. In that connection, Judge, what means, as far as you know, are being used by the Commissioners of Revenue in the cities and counties of this State to obtain the names of all of those persons who are required by the Constitutional statutory provisions of this State, considering those exempted, to be assessed with the State capitation tax?

Mr. HOWELL. I object because the Judge said he never put out any uniform regulations and, secondly, we are suing some 130 Commissioners and just to

give one blanket observation would not be relevant to any particular one.

By Mr. HARRIS:

Q. Subject to Mr. Howell's objection, and if you know, and have information in regard to the question I have asked, of your own knowledge would you please answer it?

A. The answer, Mr. Harris, is contained on Page 3 of the letter of January 6, 1964 to Mr. Howell, reading as follows——

Mr. HOWELL. This is of your own personal knowledge, is that right?

A. I would say yes. "Commissioners of the revenue, in ascertaining the names and addresses of persons assessable with a State capitation tax, rely upon the tangible personal property returns (which also make provision for the State capitation tax); upon names assessed for the preceding year; upon city directories in various instances, and upon any other source of information available."

By Mr. HARRIS:

Q. Do you know of any other sources of information available besides those you have already mentioned that they use, in fact?

A. Well, one other source would be the filing of State income tax returns. That would be a very good source.

Q. Do you know whether or not they would use lists of persons who have bought other types of licenses or have bought licenses which are considered to be taxable licenses, in a sense, like hunting and fishing and almost any other kind you can think of?

A. I would suppose an alert Commissioner of Revenue would do that but I have no personal knowledge of that particular point.

Q. But you do have personal knowledge as to everything else you have mentioned in this connection?

A. I am sure the statement read is correct. [Pp. 40-43.]

* * * * *

Q. I hate to be going back and forth but it becomes necessary. Judge, I want to limit my redirect to this business of city directories. What will a city directory tell a Commissioner of Revenue about who is twenty-one years of age or older?

A. To my personal knowledge a great many persons under the age of twenty-one have been assessed with the State capitation tax whose names have been received by the Commissioners of Revenue, or derived, from city directories or income tax returns.

Q. Do you know a single Commissioner of Revenue who picks up every name in a city directory and assesses them?

A. Well, I could not say I know of any single Commissioner of the Revenue who will go through the City directory and compare the names there with the names on the assessment roll.

Q. You don't know of anyone?

A. I say there can be none except in a small community because in a city the size of Norfolk or the size of Richmond, the time consumed in making such a comparison would be out of all proportion to the results achieved.

Q. And in most small communities Mr. Hill doesn't find it worthwhile to prepare a city directory so we had just better eliminate city directories as being a real source of material for reference?

A. It is a material source. I do not say that every Commissioner of the Revenue uses a city directory but I say that city directories in various instances——

Q. Do you know a specific instance? We are in a

court of law; if you do, I want to have the benefit of it. I think that would be helpful so as to show a variation.

A. On a question of this kind I can only give you——

Q. I am not talking about the letter.

A. The information has come to me from Commissioners of the Revenue themselves. You see, I cannot personally swear that I have gone to a Commissioner's office and verified his use of a directory.

Q. Do you know of a single locality whose Commissioner has even stated to you that he uses the city directory to send out his capitation tax assessments?

A. It is my impression that it is done in the City of Richmond.

Q. But I thought you said the City of Richmond is too big?

A. I don't say that any Commissioner of the Revenue will compare the names in a city directory with the names of people on the capitation tax roll. What I was trying to say was that a Commissioner of Revenue in a large city would find it unprofitable to attempt to compare the names in a city directory with the names on the capitation tax assessment roll for the reason that the time required and the cost of such would be unjustifiable.

Q. Judge, let me ask you this; what specific use, if he is not going to use it to compare and is not going to send a capitation tax assessment to everybody in the city directory, I want to find out the real intent of your testimony; what use would he make of the city directory in the City of Richmond for assessing capitation taxes? Is any realistic use made of it?

A. Well, I am sorry, I am not a Commissioner of the Revenue.

Q. I appreciate that. I don't want you to testify to it if you don't know.

A. I do not make the statement that the city directory is used in a comprehensive way. I believe that is one of the sources of information.

Q. I understand, but you, yourself, have no personal knowledge of how the Commissioners use it, if at all? You have a general impression that they may refer to it?

A. I have never seen a Commissioner of the Revenue personally use a city directory for any purpose.

Q. You say they rely on tangible personal property returns, and I agree with that, and you say if they ever assess you once they will assess you for the rest of time, and I agree with you in that respect. Now in all probability a person who didn't own any tangible personal property, didn't report it, probably would never be assessed with a capitation tax, would he?

A. If that person files an income tax return he would be exposed to assessment.

Q. But if he didn't file an income tax return and didn't have tangible personal property or didn't report it, he or she may not receive an assessment for capitation tax?

A. May not receive it.

Recross examination by Mr. HARRIS:

Q. In connection with the personal property tax, is it, as far as you know, Judge, the practice of the treasurers in collecting the personal property tax to also attempt at the same time to collect any delinquent capitation tax for the same person that was assessed the personal property tax.

A. Well, that point, I think, is mentioned in the letter, too. Your point is what happens——

Q. No, I will rephrase the question. My question is, as far as you know do the local treasurers, when collecting delinquent personal property taxes, make

any attempt at the same time to collect any delinquent capitation tax that might exist for the same person against whom they are trying to collect the personal property tax?

A. I should say, to the extent that the capitation tax and the tangible personal property tax appear on the same tax bill, that the treasurer will send the tax bill containing both items. We all realize that the treasurer cannot resort to legal process for the collection of the State capitation tax, although he can resort to legal process to collect the tangible personal property tax. [Pp. 44–49.]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 48

ANNIE E. HARPER, ET AL., *Appellants*,

v.

VIRGINIA STATE BOARD OF ELECTIONS, ET AL., *Appellees*.

On Appeal from the United States District Court for the Eastern District of Virginia

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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the District Court (R. 31-33) is reported at 240 F. Supp. 270.

JURISDICTION

The jurisdiction of the District Court in this case was invoked under the Fourteenth Amendment to the United States Constitution, 42 United States Code § 1983 and 28 United States Code §§ 1343(3), 2201 and 2202. The judgment of the District Court was entered on November 10, 1964, and notice of appeal was filed in that court on Decem-

ber 4, 1964 (R. 34-37). The appellants' jurisdictional statement was filed on January 15, 1965, and probable jurisdiction was noted by this Court on March 8, 1965 (380 U.S. 930) (R. 37). The jurisdiction of the Supreme Court to review the decision of the District Court by direct appeal is conferred by 28 United States Code §§ 1253 and 2101(b).

QUESTIONS PRESENTED

I. Whether provisions of Virginia law which require the payment of poll taxes as a prerequisite to voting in state and local elections violate the Fourteenth Amendment by denying the franchise to paupers and indigents and other persons who are without economic means to pay the taxes, but who are otherwise qualified to vote.

II. Whether persons who brought suit contesting the constitutionality of Virginia laws requiring the payment of poll taxes as a prerequisite to voting in state and local elections on the ground that such requirement discriminatorily disenfrachises them and other persons similarly situated who are without economic means to pay such taxes, and whose standing to sue is challenged by the State on the ground that "paupers" are disqualified from voting under state law, are entitled to a judicial determination that the "pauper" disqualification is invalid under the Fourteenth Amendment.

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Virginia Constitution and of the State's statutes are set forth in the Appendix, *infra*. pp. 36-41.

STATEMENT

This case is before the Court on appeal from an order of dismissal entered by a three-judge court convened pursuant to 28 United States Code § 2284. The appellants brought the action on behalf of themselves and other simi-

larly situated, for the purpose of having declared unconsittutional and to enjoin the enforcement and execution of provisions of the Virginia Constitution and statutes which require the payment of poll taxes as a prerequisite to registration and voting in state and local elections (R. 2-7).[1] The appellants, in the District Court, also challenged the the constitutionality of the provisions of § 23 of the Virginia Constitution and § 24-18 of the state Code which disqualify "paupers" from registering or voting in any election conducted in the State (R. 22). The poll tax requirement and "pauper" exclusion were alleged by the appellants to be violative of the Equal Protection and Due Process clauses of the Fourteenth Amendment.

The appellants are Negro citizens of the United States, and residents of Virginia and of Fairfax County within that State (R. 3, 5). They desire to register and vote in future state and local elections, and qualify to do so in every respect but one; they lack economic means to pay the poll taxes required of them by the laws of Virginia (R. 3).

Appellant Annie E. Harper is single; she formerly supported herself principally by doing household or domestic work; at present her sole regular income is derived from Federal social security benefits. Appellant Harper, because she has been a resident of Virginia for more than three years and has never paid poll taxes, is required by Virginia law to pay three years' back poll taxes ($1.50 a year), plus five percent penalty for late payment, as well as interest

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[1] The 24th Amendment to the Constitution of the United States is inapplicable to state and local elections; it provides as follows:

> "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

charges, in order to register and qualify to vote in future state elections (R. 3-4).[2]

Appellant Gladys A. Berry is single; she is not gainfully employed and has no regular income; she provides day care for seven minor children, two of whom are her own and five of whom are the children of her two married daughters; both daughters are separated from their husbands and do household or domestic work to support themselves, appellant Berry and the seven minor children. Appellant Berry, like appellant Harper, is disqualified from registering and voting in state elections in Virginia unless she pays three years' back poll taxes, plus the five percent penalty and interest charges—a total of $5.01 (R.4).

Appellant Curtis Burr works in the building and construction industry which is characterized by irregular employment because of varying and uncertain weather conditions; in calendar 1963 his gross income was less than $5,000. Appellant Curtis Burr's entire income is consumed in providing the necessities of life for his wife, appellant Myrtle L. Burr, and their nine children. Although appellant Curtis Burr paid his poll taxes for 1961 and 1962, he did not pay the tax for 1963, and does not expect to be able to pay it hereafter, because of the low earnings received from his employment and the increasing cost of supporting his family, particularly as his children grow older. In any year in which appellant Curtis Burr wishes to register and vote in a state election, he will have to show payment of three years' back poll taxes, plus penalties and interest (R. 4).

Appellant Myrtle L. Burr is supported by her husband, appellant Curtis Burr, whose annual income of less than

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[2] If a person does no pay his poll tax by December 5, a five percent penalty is incurred, raising the amount due to $1.58. § 58-963, Code of Virginia, 1950. If the tax is not paid by the following June 30, interest at the rate of six percent a year is charged against the principle and penalties. § 58-964, Code of Virginia, 1950. Under the State's requirements, therefore, appellant Harper must pay $5.01 in order to register and vote.

$5000 is entirely consumed in providing the necessities of life for himself, his wife, appellant Myrtle L. Burr, and their nine children. Appellant Myrtle L. Burr, like her husband and appellants Harper and Berry, has been a resident of Virginia for more than three years, but because she has never paid poll taxes, she must pay three years' back taxes, plus penalties and interest, in order to register and qualify to vote in future state elections. If appellant Curtis L. Burr does not pay his poll taxes for 1965, he will have to pay three years' cumulative taxes, plus penalties and interest for both himself and his wife, or a total of $10.02, before they will both be qualified to register and vote (R. 5).

The appellees in this proceeding are the Virginia State Board of Elections, the Electoral Board of Fairfax County, Virginia, and Waneta M. Buckley, the General Registrar of Fairfax County. These are the governmental boards and officers of the State of Virginia and Fairfax County, having the responsibility under Virginia law to enforce the election laws by preventing persons who have not paid their poll taxes from registering for, or voting in state and local elections (R. 3).

The facts of this case are undisputed. The appellants moved for summary judgment on May 26, 1964, and oral argument was heard by the District Court on October 21, 1964.[3] On November 12, 1964, the Court rendered its decision and a final order granting the appellees' motion to dismiss and denying the relief sought by the appellants. The District Court declined to hold the provisions of Virginia law which require the payment of poll taxes as a prerequisite to registering and voting unconstitutional, for the stated reason that it was precluded from doing so by this Court's decision in *Breedlove* v. *Suttles*, 302 U.S. 277.

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[3] The instant action was consolidated for the purpose of hearing with a similar case (*Butts* v. *Harrison*, Civil Action No. 3346) then pending in the District Court (R.31). No appeal was perfected in that case from the adverse ruling of the District Court.

The District Court also declined to hold the sections of state law barring "paupers" from registering and voting unconstitutional, on the ground that there was no showing of the disqualification being employed to prevent the appellants or members of their class from voting

The ruling of the District Court upholding the constitutionality of the provisions of state law in question and refusing to enjoin their enforcement and execution constitutes the subject of this appeal.

SUMMARY OF ARGUMENT

I.

The provisions of Virginia law requiring payment of poll taxes as a condition of voting in state and local elections are incompatible with controlling constitutional principles. This is made clear by recent decisions of the Court recognizing the high priority which attaches in our democracy to the right to vote. State poll tax requirements also conflict with current understanding of the scope and significance of the Due Process and Equal Protection clauses of the Fourteenth Amendment, as elucidated by the Court.

The Court, in its recent opinion in *Harman* v. *Forssenius*, 380 U.S. 528, noted some of the most frequently-voiced objections to the imposition of a poll tax as a prerequisite to voting. Not the least among these is the disenfranchisement of poor persons resulting from their inability to pay the tax. The Court also noted the historic fact that the Virginia poll tax was adopted as a device to deprive Negroes of the suffrage. Congress likewise has recently expressed its dissatisfaction with poll tax requirements—first, by initiating the Twenty-fourth Amendment which prohibits use of such taxes in federal elections, and second, in the Voting Rights Act of 1965 (P.L. 89-110, 89th Cong. 1st Sess.) which contains a clear congressional statement of opposition to use of the tax in any election.

Voting is the highest form of political expression available to the citizen of a democracy. It is entitled to the same

degree of protection against state abridgement as other forms of expression protected by the First Amendment. The right of free speech, the right to petition the government for redress of grievances, and the right of assembly and association are only of limited value to the citizen if they are not supplemented and secured by the right to vote. The Court has held that a State's imposition of a flat tax as a condition of the exercise of free speech is an unconstitutional abridgement which must fall, by virtue of the First Amendment. A poll tax imposed as a condition of voting equally infringes on the individual's freedom of expression and is no less unconstitutional.

The Virginia poll tax arbitrarily and irrationally interferes with the exercise of the franchise by various classes of the State's citizens, thereby depriving them of equal protection of the laws. Not only are poor persons such as the appellants, discriminatorily denied the franchise, because of their inability to pay one year's tax, but the cumulative feature of the tax further enforces its discriminatory effect. A person who has never paid the tax must pay three years' back taxes, plus penalty and interest charges for late payment, in order to register and vote for the first time. The economic discrimination effected by the poll tax has a particularly heavy impact on Negroes as a class, since a larger proportion of Negroes than whites live at or close to the subsistence level. The decisions of this Court teach that a State may not thus exercise its power to discriminate against classes of its citizens in voting matters.

In addition to the three-year cumulative provision, the discriminatory design of the Virginia poll tax laws is further evidenced by the requirement that in order to vote, one must pay his poll taxes six months before an election, at a time when the candidates have not been selected and the election issues are still undetermined. The structure and administrative scheme of these laws reveal clearly that they were intended to serve the purpose of restricting the franchise. The Virginia Supreme Court of Appeals has ac-

knowledged this to be the case, and that the tax was not intended to be a revenue-raising measure.

There are a number of classes of persons who are exempt from paying the Virginia poll tax, but who are nevertheless permitted to vote. The State thereby creates privileged classes of voters, and deprives those not accorded such favorable treatment of equal protection of the laws. The fact that some classes of persons can vote without paying the tax is additional evidence that payment of the tax is unrelated to one's qualifications to vote. Unlike a literacy test, payment of poll taxes is in no way indicative of a person's fitness or capacity to vote.

Breedlove v. *Suttles,* 302 U.S. 277, which was relied on by the District Court in dismissing the case, cannot be reconciled with more recent decisions of this Court which have emphasized the essential nature of the right to vote and the protections surrounding it by virtue of the Fourteenth Amendment. Nor is justification for present-day use of the poll tax provided by the fact that it has been used by various States since the early history of the country. The tax was originally resorted to as part of a movement to broaden the franchise—to be paid in lieu of property and other tax-paying requirements. The poll tax was not intended to have the disenfranchising effect which motivated its adoption by States in later years. Because of its inconsistency with more recent voting and Fourteenth Amendment cases decided by the Court, the *Breedlove* case should not be deemed controlling herein.

II.

The provision of Virginia law rendering "paupers" ineligible to vote in any election held in the State, is manifestly violative of the Equal Protection Clause. A State may not thus directly disenfranchise the poor as a class. The appellants are entitled to a declaration of unconstitutionality and a decree enjoining the application to them of this

provision of law. By withholding such relief, the District Court erred, for it failed to acknowledge the explicit declarations of the Virginia Attorney General that by virtue of this provision of law, the appellants would be ineligible to vote, even if it were not for the poll tax requirement.

ARGUMENT

I. PROVISIONS OF VIRGINIA LAW WHICH REQUIRE THE PAYMENT OF POLL TAXES AS A PREREQUISITE TO VOTING VIOLATE THE FOURTEENTH AMENDMENT

A. Introduction

The practice by some States of requiring citizens to pay poll taxes as a condition of voting is an anachronism under our constitutional system. It is impossible to justify the practice in the light of decisions by this Court in recent years which have repeatedly emphasized the high priority attaching under our democratic form of government to a free and unabridged right to vote. The Court has also recently given the Due Process and Equal Protection clauses of the Fourteenth Amendment a scope and significance surpassing that which it formerly had. These two lines of judicial authority point to the inescapable conclusion that the poll tax, when made a condition of voting, is an unconstitutional restriction on the exercise of the franchise.

The unfavorable view which the Court takes of the poll tax requirement has already been foreshadowed in *Harman* v. *Forssenius*, 380 U.S. 528, 538-540, where the Court called attention to some of the more objectionable features of this outdated practice, noting specifically the "general repugnance" that is generally felt regarding the "disenfranchisement of the poor occasioned by failure to pay the tax." *Id.* at 539. The Court also cited with respect to the Virginia tax, particularly, the well-documented historical fact that it was born of a specific desire to disenfranchise the Negro. *Id.* at 543-544.

The Court's consideration of the poll tax issue at this time is particularly significant, in that it follows close on

the heels of enactment by Congress of the Voting Rights Act of 1965 (P.L. 89-110, 89th Cong., 1st Sess.) which has as its objective the securing of voting rights for Negroes in areas of the country where discrimination on the basis of race in voting matters has been most common. This congressional action reflects the wide-spread popular discontent which has developed in the country with respect to outmoded and discriminatory election practices which have long been tolerated, but which, it is now realized, constitute major imperfections in our governmental system. Much of the movement for the elimination of arbitrary and irrational abridgments of voting rights has received impetus from this Court's historic pronouncement of the guiding principle, "one person, one vote." *Reynolds* v. *Sims*, 337 U.S. 533, 558, quoting, *Gray* v. *Sanders*, 372 U.S. 368, 381. As part of this evolving public policy, Congress, in the Voting Rights Act of 1965, made the following specific legislative findings (P.L. 89-110, § 10(a)):

> [T]hat the requirement of the payment of a poll tax as a precondition to voting
>
> (i) precludes persons of limited means from voting or imposes unreasonable financial hardship upon such persons as a precondition to their exercise of the franchise.
>
> (ii) does not bear a reasonable relationship to any legitimate State interest in the conduct of elections, and
>
> (iii) in some areas has the purpose or effect of denying persons the right to vote because of race or color.
>
> Upon the basis of these findings, Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition of voting.[4]

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[4] In implementation of these congressional findings and the declaration of policy, P.L. 89-110 directs the Attorney General to institute in the federal district courts in the name of the United States such actions as are necessary to invalidate state poll tax requirements which conflict with the congressional findings and policy (§ 10(b), (c).)

Prior to the recent voting rights legislation, the poll tax received the specific attention of Congress in 1962, when the Twenty-fourth Amendment was passed and sent to the States for ratification. That amendment, which prohibits use of a tax as a prerequisite to voting in federal elections, was approved by the requisite number of state legislatures, and became effective on February 4, 1964. The Twenty-fourth Amendment was only one of numerous bills to abolish the poll tax which were introduced in Congress between 1939 and 1962.[5] Indeed, during that period, the House of Representatives on five different occasions passed anti-poll tax bills, only to have them die in the Senate as the result of filibusters. Restricting use of the poll tax by means of constitutional amendment was resorted to as a strategy to overcome the point of view held by a number of Senators that a federal statute on the subject could be unconstitutional.[6] Further, the Twenty-fourth Amendment was limited to apply to federal elections only, in order to conform to the opinion of some members of Congress that

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[5] The legislative history of anti-poll tax proposals from the 75th through the 87th Congresses (1939-1961) is contained in Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 2nd Sess. (1962) 29-47. See also Ogden, *The Poll Tax in the South* 243-249 (1958).

[6] See the statement of Senator Holland, the leading congressional sponsor of the Twenty-fourth Amendment. Hearings before Subcommittee No. 5, *supra*, 25. The question of congressional authority to enact an anti-poll tax law has been a subject of controversy for many years. See, e.g., Kallenbach, *Constitutional Aspects of Federal Anti-Poll Tax Legislation*, 45 Mich. L. Rev. 717 (1947); Christensen, *The Constitutionality of National Anti-Poll Tax Bills*, 33 Minn. L. Rev. 217 (1949);

state and local elections should be conducted according to standards set by the States, free from federal control.[7]

At the present time, besides Virginia, three other southern states and a northern state require poll tax payments as a condition of voting. Alabama,[8] Mississippi,[9] and Texas[10] require poll tax payments for all state and local elections, while in Vermont,[11] to be eligible to vote in town elections, town meetings, and school district meetings a person must have paid the "poll and old age assistance taxes" due the

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[7] Statement of Senator Holland, *supra*. The use of the poll tax as a prerequisite to voting in state and local elections is not rendered constitutional, as the appellees contend, because the reach of the Twenty-fourth Amendment is limited to federal elections, or because Congress chose to initiate a constitutional amendment, rather than resorting to legislation, as a method of dealing with the issue. The Twenty-fourth Amendment was made applicable to federal elections only, and not to state or local elections, because Congress, in initiating the amendment, chose at that time to address itself specifically to the poll tax problem as it related to federal elections, leaving until another day the decision of what, if anything, to do about state and local elections. Moreover, the lack of a constitutional provision in terms barring the poll tax as a voting prerequisite in state and local elections does not validate the practice, if, as the appellants show *infra*, it is otherwise violative of Fourteenth Amendment. To contend otherwise would be the equivalent of suggesting that disenfranchisement of Negroes and women would be permissible today if it were not for the existence of the Fifteenth and Nineteenth Amendments. Manifestly such a position would be untenable, in view of the meaning which is now recognized as attaching to the Fourteenth Amendment.

[8] Alabama Const. (1901), § 178, as amended by Amendments 96, 90, 109 and § 194; Alabama Code (1958), Title 17, § 12, Title 35, §§ 11, 214.

[9] Mississippi Const. (1890), §§ 241, 243; Mississippi Code (1942), §§ 3130, 3160, 3163, 3163-02, 3235.

[10] Texas Const. (1876), Art. 6, § 2; Vernon's Ann. Stat., Election Code, Arts. 5.02, 5.09.

[11] Vermont Stat. Ann., Title 16, § 363, Title 24, §§ 701, 1309, Title 32, §§ 3601, 5011-5023, 5161.

town. [12] The Court's holding in this case, therefore, in addition to its effect on Virginia, will have a significant impact on those other States.

A further major factor in this litigation, the appellants recognize, is that in *Breedlove* v. *Suttles*, 302 U.S. 277, the Court upheld the constitutionality of a Georgia poll tax in a decision which the District Court, at least, considered dispositive herein. The appellants, therefore, in addition to showing below the reasons why the Fourteenth Amendment prevents a State from requiring the payment of poll taxes as a condition of voting, will demonstrate more specifically why *Breedlove* v. *Suttles* should not be deemed controlling with respect to this litigation. In the discussion which follows, it should also be borne in mind that the appellants do not contest Virginia's right to levy a poll tax, [13] as such, but only the requirement that such a tax be paid as a condition of voting.

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[12] In Alabama and Texas, the annual poll tax is fixed by statute at $1.50, and in Mississippi it is $2.00 (*supra*, ns. 8, 9, 10).

In Vermont, towns and municipalities have authority to set their own annual tax rates, thereby establishing the amount of poll tax each citizen must pay in order to vote (*supra*, n. 11). The poll taxes required to be paid by individuals in various towns in Vermont currently range from $3.50 to more than $18.00. Letter to the Editor by Philip H. Hoff, Governor, State of Vermont, The New York Times, May 28, 1965. Added to the amount of his local poll tax, every person in Vermont must also pay as a prerequisite to voting in local elections a flat tax of $5.00 which is earmarked to be used by "the department of social welfare for old age assistance purposes." Vermont Stat. Ann., Title 32, § 5012.

[13] A "poll tax" by definition (also "capitation" or "head" tax) is a direct uniform tax levied on each head or person. *Webster's Third New International Dictionary* (unabridged, 1961). The term has no reference to the "poll" where voting is conducted.

B. The right to vote is correlative to other rights protected by the First Amendment, and like them, its exercise may not be conditioned on payment of a tax

This Court has stressed on numerous occasions that, "'[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.' The right is fundamental 'because preservative of all rights.'" *Harman* v. *Forssenius, supra,* 380 U.S. at 537, quoting *Reynolds* v. *Sims, supra,* 377 U.S. at 555, and *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370.[14] The Court has also referred to the right to vote as falling within that class of rights which, like freedom of speech, are "so vital to the maintenance of democratic institutions.'" *Carrington* v. *Rash,* 380 U.S. 89, 94, quoting *Schneider* v. *State,* 308 U.S. 147, 161. To analogize the right to vote to the right of free speech is appropriate, for voting, in a sense, is free speech in its ultimate and most valued form. The citizen, when he votes, expresses his innermost convictions as to who the leaders of government shall be, and how he believes the political issues of the day should be resolved. One's ability to speak his mind freely in a public park, or to publish his views in printed form without governmental restriction is of little value if he is denied the most esteemed form of political expression in the privacy of the voting booth. Precisely because it is "preservative of all rights," *Yick Wo* v. *Hopkins, supra,* 118 U.S. at 370, the right to vote is deserving of the highest degree of protection against erosion by state action.

If Virginia's poll tax of $1.50 were imposed as a condition of the citizen's exercise of constitutionally protected speech, there is no question but that it would be struck down. *Murdock* v. *Pennsylvania,* 319 U.S. 105; *Jones* v.

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[14] See also *Gray* v. *Sanders, supra,* 372 U.S. at 379-381; *Wesberry* v. *Sanders,* 376 U.S. 1, 17-18.

Opelika, 319 U.S. 103.[15] There is no reason why a different result should obtain when the payment of such a tax is made the condition of voting. In both instances the State is taxing the citizen's act of expressing himself. As the Court said in the *Murdock* case, "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment." 319 U.S. at 112. See also *Grosjean* v. *American Press Co.*, 297 U.S. 233, 244-251; *Speiser* v. *Randall*, 357 U.S. 513, 518. The right to vote is of little value if it may thus be "indirectly denied . . . or manipulated out of existence," *Harman* v. *Forssenius, supra*, 380 U.S. at 540. Accordingly, taxes exacted as the price of exercising freedoms protected by the Constitution are presumptively invalid, for "[o]n their face they are a restriction of the free exercise of those freedoms . . . " *Murdock, supra*, at 114. They are "as obnoxious as the imposition of a censorship or a previous restraint." *Follett* v. *McCormick*, 321 U.S. 573, 577.

The suggestion that the right to vote is as deserving of the protection of the First Amendment as the right of free speech, is supported by both reason and precedent. The Court has held that the right to pursue social and legal objectives by means of litigation in the courts is a right protected by the First Amendment. *NAACP* v. *Button*, 371 U.S. 415, 429-431; cf. *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 5-6. The First Amendment's protection also extends to efforts to obtain a particular

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[15] The Virginia poll tax, like the taxes in the cited cases is a flat fee. The amount collected is not related to any state regulatory scheme, and it is not used to defray the expense of conducting elections. One dollar of each person's poll tax is designated by the Virginia constitution to be applied "exclusively in aid of the public free schools." The remainder of the tax, as well as penalties and interest charges which must be paid by citizens as a condition of voting, are used to support the general public revenue requirements. § 173, Virginia Constitution. § 58-49, Code of Virginia, 1950. Cf. *Murdock* v. *Pennsylvania, supra*, 319 U.S. at 113-114.

course of action by the legislative or executive branch of government. As the Court has stated, "The right of petition is one of the freedoms protected by the Bill of Rights . . ." *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight*, 365 U.S. 127, 138. In *Edwards* v. *South Carolina*, 372 U.S. 229, 235, Negro students who peacefully assembled at the site of the state government, and there demonstrated and expressed their grievances against laws of South Carolina which allegedly "prohibited Negro privileges in this State" were said by the Court to have engaged in the exercise, in their "most pristine and classic form," of "constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances." As construed by the Court, the protection of the First Amendment thus plainly extends to the right of the citizen to assert his views by a variety of means against what he conceives to be adverse public policies. He may express his position by means of litigation in the courts, in legislative cloakrooms, in the offices of government officials, and on the State House grounds. It would be ironic, indeed, to deny the same degree of constitutional protection to the citizen's right to express himself with respect to those same public policies, by casting his ballot—the classic and most meaningful mode of expression available in a democratic society.

The act of voting unquestionably partakes both of the nature of speech and petitioning the government for redress of grievances. It is the most significant single direct act available to the citizen as a means of giving voice to his beliefs concerning the affairs of government. Although the right to vote is nowhere mentioned in the First Amendment, the Court has more than once recognized that the protection of that amendment extends beyond its specific words to protect from abridgment concomitant personal rights necessary to make the express guarantees of the provision fully meaningful. *Lamont* v. *Postmaster General*, 381 U.S. 301; *NAACP* v. *Alabama*, 357 U.S. 449, 460;

Griswold v. *Connecticut*, 381 U.S. 479; *NAACP* v. *Button*, *supra*, 371 U.S. at 430-431; *Thomas* v. *Collins*, 323 U.S. 516; *Martin* v. *City of Struthers*, 319 U.S. 141. Such interpolations have been recognized as necessary in order for the Bill of Rights to fulfill its purpose. *Bolling* v. *Sharpe*, 347 U.S. 497, 499; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239; *Kent* v. *Dulles*, 357 U.S. 116, 125-127; *Aptheker* v. *Secretary of State*, 378 U.S. 500, 505-508; *Meyer* v. *Nebraska*, 262 U.S. 390; *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535; *Truax* v. *Raich*, 239 U.S. 33, 41. The Court aptly summarized the case for according similarly protected status to the right to vote when it stated: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry* v. *Sanders*, *supra*, 376 U.S. at 17.

Decisions of the Court, as shown by the foregoing discussion recognize that the right to vote is correlative to the rights of free speech and petition which are protected by the First Amendment. Accordingly, the appellants submit, under the doctrine of *Murdock* v. *Pennsylvania*, *supra*, a State is prohibited by the Fourteenth Amendment from imposing a tax as a condition of voting.

C. Virginia's poll tax laws violate the Fourteenth Amendment, because they discriminate against classes of persons otherwise qualified to vote

The appellants recognize that within the framework provided by our Constitution, the States have "broad powers to determine the conditions under which the right of suffrage may be exercised." *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45, 50; *Carrington* v. *Rash*, *supra*, 380 U.S. at 91. It is equally true, though, that in assessing the validity of limitations on the franchise, we deal "with matters close to the core of our constitutional system. 'The right . . . to choose,' *United States* v.

Classic, 313 U.S. 299, 314, that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." *Carrington* v. *Rash, supra,* 380 U.S. at 96.

The appellants submit that the Virginia poll tax laws are unconstitutional because they result in the "casual deprivation" of the right to vote for many persons in the State. Furthermore, even if it could be assumed that these laws were intended to serve a legitimate purpose, namely, to strengthen and improve the electoral process, it is clear from their nature and structure, that the poll tax provisions are not reasonably designed to accomplish this end. In other words, these laws fail to stand the test of reasonableness and rationality which must be satisfied when a State purports to establish legislative classifications. By means of its poll tax laws, Virginia has sought to classify persons for the purpose of determining voting eligibility. But as this Court has said, legislative classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which classification is proposed, and can never be made arbitrarily and without any such basis . . . The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose . . ." *McLaughlin* v. *Florida,* 379 U.S. 184, 190-191; *Carrington* v. *Rash, supra,* 380 U.S. at 93.

1. Disenfranchisement of the poor

The Virginia Supreme Court of Appeals has supplied the most frequently heard official justification for the State's poll tax. In *Campbell* v. *Goode,* 172 Va. 463, 466, 2 S.E. 2d 456, 457, the court said with respect to the levy that its "imposition was not intended primarily for the production of revenue, but to limit the right of suffrage to those who took sufficient interest in the affairs of the State to qualify themselves to vote." It might be contended that this state-

ment tells something less than the whole truth, indeed, that it is entirely euphemistic, in view of the indisputable evidence that the Virginia poll tax was intended primarily as a device to disenfranchise the Negro.[16] Even accepting at face value, however, the Virginia court's justification for the tax, it is plain that the reason given does not satisfy the constitutional test of rationality. Lengthy discourse is unnecessary to demonstrate the fact that failure to pay the tax is no certain indicator of a citizen's lack of interest in the affairs of government. On the contrary, by conditioning the right to vote on payment of the poll tax, Virginia has disenfranchised members of the large class of economically under-privileged and impoverished persons who both wish to be, and are responsible citizens but who for various reasons cannot afford to pay the required amount.[17]

Plaintiffs are members of the class of persons who are adversely affected in this manner by the poll tax and are

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[16] *Harman* v. *Forssenius, supra,* 380 U.S. at 543. The Proceedings and Debates of the Virginia Constitutional Convention (1901-1902) clearly reflect the racist appeals made by proponents of the poll tax, at the time of its adoption by the State. Disenfranchisement of the Negro was also undoubtedly the principal reason for adoption of the poll tax by other southern states in the period from 1890 to 1908. Ogden, *supra,* 410. The Mississippi Supreme Court has described the attitude which characterized that State's Constitutional Convention of 1890. In *Ratliff* v. *Beale,* 74 Miss. 247, 266-268, 20 So. 865, 868-869, the court declared that "Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct exercise of the franchise by the negro race. [The tax] was primarily intended by the framers of the constitution as a clog upon the franchise, and secondarily and incidentally only as a means of revenue."

[17] "The most shiftless of men may pay the tax because he found a five dollar bill in the street. The worthiest citizen may prefer to feed his family . . ." *Christensen,* 33 Minn. L. Rev., *supra,* at 227, n. 53.

thereby prevented from voting. The class of persons who, because of their poverty, are deprived of the right to vote includes, *inter alia*, many individuals who are completely without economic means and are dependent for subsistence on relatives, friends, and in many instances, the public welfare. The disenfranchised class also includes many other persons who have some identifiable income or property, but whose lives are characterized by poverty to such a degree that they cannot afford to pay for other than the necessities of life such as food, clothing, housing, and medical and dental care. Many such individuals are employed in low paying jobs; others are unemployed a substantial part of the time; and others have minimal incomes in the form of social security benefits, retirement pensions, unemployment compensation, medical disability benefits, and the like.[18]

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[18] An annual income of $3000 is generally considered today to be necessary to meet the minimum current needs of a family of four. *Annual Report of the Council of Economic Advisors to the President, January 1964* 58; Orshansky, *Counting the Poor: Another Look at the Poverty Profile*, Social Security Bulletin, 3, 10, 28, Table E, Vol. 28, No. 1 (January 1965). Census figures for 1960 show 27.9 percent of all families in Virginia having incomes below the $3,000 level, and 17.4 percent of the State's families having incomes below $2000. Demonstrating the commonly known fact that there is a higher proportionate incidence of poverty among Negroes than among white persons, the same Census figures show that 22.4 percent of the white families in Virginia have incomes below the $3000 standard, while among nonwhite families the proportion receiving a substandard income is appreciably greater—54.1 percent. U. S. Dept. of Commerce, *1960 Census of Population, Supplementary Report*, PC (S1)—43. Larger families with more children, of course, have higher minimum income needs than are reflected by the foregoing figures. Thus, for a family of 11, such as that of the appellants Curtis and Myrtle Burr, the boundary of poverty is about $7000—or $2000 more than the Burr's annual income. See *Orshansky, supra*, 28; U.S. Dept. of Labor, Bureau of Labor Statistics, *Estimating Equivalent Incomes or Budget Costs by Family Types*, 83 Monthly Labor Review 1197 (1960).

It is evident, therefore, that while Virginia's Court of Appeals proclaims that the State's only purpose in having the poll tax is to insure that those who vote are interested enough in the affairs of government to qualify themselves by making the required payment, the actual effect of the tax is to disenfranchise the poor as a class. The lack of rational relationship between the purported end sought and the means of accomplishment confirms the unconstitutionality of the tax. Moreover, even it it should be suggested that those who are too poor to pay the tax, should not be entitled to vote,[19] the disenfranchisement which is effected is equally impermissible. Whether the disenfranchisement of the poor which results from tying the poll tax to the ballot is the unintentional result of an otherwise permissible objective, i.e., to strengthen the electoral process, or whether it is a conscious effort to limit the franchise to persons of means, it amounts in either event to the drawing of "an unconstitutional line . . . between rich and poor." *Douglas* v. *California*, 372 U.S. 353, 357. It is settled law that under the Equal Protection Clause, "a State can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin* v. *Illinois*, 351 U.S. 12, 17. Further, because of the economic discrimination effected by the Virginia poll tax, it has a particularly heavy impact on Negroes. A higher percentage of Negroes than whites are inevitably disenfranchised by the tax, because, as shown *supra*, n. 18, a much larger proportion of Negroes than whites in Virginia live at or close to the subsistence level.[20] In sum, it is clear that Virginia's poll tax require-

[19] The contention has been made that a State should have the right to restrict suffrage to those who pay poll taxes and thereby contribute financially to the operations of government.

[20] The inferior economic position of Negroes as a class is also shown by 1960 Census data showing that in Virginia the average income of Negroes is only 51 percent of the average income of white persons. Miller, *Rich Man, Poor Man* 99 (1964). Although the appellants did not allege that the Virginia poll tax laws violate

ment inevitably effects "invidious discriminations based upon . . . economic status," thereby violating the Fourteenth Amendment. *Reynolds* v. *Sims*, *supra*, 377 U.S. at 566.[21]

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the Fifteenth Amendment, such a violation occurs where, as here, legislation, which on its face treats all races even-handedly, is intended to, and does effect discrimination against Negroes as a group. Negroes in Virginia historically have been the victims of a state-imposed system of segregation which has relegated them to a lower position on the social and economic scale than whites. Public laws and regulations have been utilized in Virginia to maintain racial segregation in such areas of activity as the public schools, recreation facilities, public conveyances, public facilities, housing and voting practices. See, e.g. *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218; *Tate* v. *Department of Conservation and Development*, 133 F. Supp. 53 (E.D. Va.), affirmed 231 F. 2d 651 (C.A. 4), certiorari denied, 352 U.S. 838; *Morgan* v. *Virginia*, 328 U.S. 373; *Blackwell* v. *Harrison*, 221 F. Supp. 651 (E.D. Va.); *City of Richmond* v. *Deans*, 281 U.S. 704; *Virginia State Board of Elections* v. *Hamm*, 379 U.S. 19. The segregated society thus fostered by the State's laws has had its foreseeable result in widespread incidence of racially discriminatory employment practices and the relatively lower economic status of Negroes as a class. The burden of the poll tax, therefore, naturally falls more heavily on this group than on whites. In the social and economic environment created by Virginia's segregation laws, the "inescapable human effect" of the poll tax requirement is to "despoil colored citizens" of their voting rights to a greater extent than whites. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347. As the Court has stated, "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson*, 307 U.S. 268, 275.

[21] Vermont, one of the five states where a poll tax is imposed as a condition of voting, exempts from paying the tax, *inter alia*, persons "actually poor" and persons "receiving old age assistance." Vermont Stat. Ann. Title 32, § 3801. However, an exemption for "paupers" or "poor" persons, assuming there is some means of administering it, obviously does not save a poll tax from invalidity if, as the appellants have argued *supra*, the right to vote is protected against abridgement by state taxation in the same manner as other forms of expression guaranteed by the First Amendment.

2. Additional voter disqualifications resulting from Virginia's poll tax laws

The unconstitutionality of the laws under attack is manifested not only by the economic discrimination resulting from the poll tax itself, but also by the structure and administrative scheme by which the laws function. Thus, by means of its poll tax laws Virginia has imposed arbitrary restrictions and limitations on the exercise of the franchise, resulting in invidious discrimination against the classes of persons adversely affected. As we show below, the determinants of voter eligibility which are established by these laws are no less arbitrary and irrational and hence, violative of the Fourteenth Amendment than that struck down by the Court in *Carrington* v. *Rash*, *supra*, 380 U.S. 89, where it was held that a State may not deny the franchise to a person merely because he happens to be in the military service. "Casual" deprivations of the right to vote, as the Court held in that case, are impermissible under our constitutional system. *Id.* at 96.

a. *The requirement that poll taxes be paid for three years cumulatively.* As noted previously (*supra*, pp. 3-5), the Virginia laws contain a cumulative provision, requiring that a person must pay his poll taxes for three years preceding the election in which he wishes to vote.[22] Thus, an individual's eligibility to vote in an election is established by the fact that he performed a certain act, i.e., paid his poll tax, three years earlier. If the tax was paid that year prior to the due date, and timely payment was made each of the two succeeding years, the individual's payment of $4.50 in annual installments over the three-year period establishes his eligibility to vote.[23] In any year that a

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[22] In Alabama and Mississippi the poll tax is cumulative for the two years preceding an election. See p. 12, *supra*.

[23] Payment of the third year's tax by December 5, establishes one's eligibility to vote in the interim until the following December.

person does not pay his poll tax by the date it is due, a five percent penalty is added (raising to $1.58 the amount due for that year), and after June 30 of the year following the due date, interest at the rate of six percent per year is added to the principle and penalty. The net effect of these provisions is to attach to the ballot price tags of varying amounts—the charge to the voter being determined by his diligence, as well as his ability to pay the tax, plus added penalties and interest, at specified times. It seems evident that whatever right the State has to impose penalties and interest charges on delinquent taxpayers, it may not, under the Fourteenth Amendment, attach arbitrary and varying monetary values to the ballot. To do so, is to discriminate in favor of those who pay the lesser amounts as against those who must pay a higher price for the right to vote.

The discriminatory purpose underlying the three-year cumulative feature of the Virginia poll tax laws is further brought to light by the clause in Section 22 of the State Constitution which provides that the collection of the poll tax assessed against anyone "shall not be enforced by legal process until the same has become three years past due" (*infra*, p. 37). Hence, although the State on the one hand, by means of penalties and interest charges, makes delinquent taxes progressively more difficult to pay, in Section 22 of the Constitution, it in effect disclaims legal responsibility for collecting the taxes until they are three years past due. The history of Section 22 shows that it was not coincidence that the prohibition was included against enforcement of the tax until after it had ceased to relate to voting. Since the purpose of the constitutional convention of 1901-1902 in adopting the poll tax was to restrict the suffrage, the delegates decided not to make

its collection compulsory, for fear of defeating the real object they had in view.[24]

b. *The requirement that poll taxes be paid six months before the election.* To be eligible to vote in a general election in Virginia, a person must pay all poll taxes that he owes at least six months prior to the election.[25] This obviously is an arbitrary and inconvenient deadline for payment of the taxes, and by failing to meet it many persons are disenfranchised at a time when the candidates have not been selected and the election issues are still undetermined.[26] The date has no relation to the efficient functioning of the election machinery, since there are registration procedures which exist entirely apart from the poll tax requirement. The State has permanent registration for all persons previously registered, and new voters may register up to 30 days before an election, provided their poll taxes have been paid by the six-month deadline. §§ 24-67, 24-74, Code of Virginia, 1950; § 20, Virginia Constitution (*infra*, p. 36). When viewed in relation to other evidence of the discriminatory purpose that the Virginia poll tax was intended to serve, the conclusion

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[24] Ogden, *supra*, 64-65. See also *Campbell* v. *Goode, supra*, 172 Va. 463, 2 S.E. 2d 456. That Virginia has deliberately avoided any compulsion insofar as payment of the poll tax is concerned is also shown by the fact that Section 173 of the State Constitution provides that the poll tax "shall not be a lien upon, nor collected by legal process from, the personal property which may be exempt from levy or distress under the poor debtor's law." And see § 58-50, Code of Virginia, 1950. There is no such exemption for other forms of state taxes, and assessments. § 190, Virginia Constitution; §§ 34-4, 34-5, Code of Virginia, 1950.

[25] In Alabama, Mississippi and Texas, the deadline for poll tax payment is approximately nine months before the general election. *Supra*, p. 12.

[26] Party primary elections for the selection of candidates are held in all instances in Virginia, subsequent to the deadline for payment of poll taxes. § 24-349, Code of Virginia, 1950.

is apparent that the payment deadline was deliberately set six months in advance of the election in order to discourage poll tax payments, rather than to facilitate or encourage them.[27] It cannot be doubted that many persons through inadvertence or lack of diligence let the deadline go by without paying their poll taxes, but when the election draws near and candidates and issues are known, find that they cannot vote because they did not pay their poll taxes on time. This arbitrary provision has a particularly discriminatory effect on less educated persons who are more likely to be unaware of the time when the tax should be paid.[28]

Thus, it is clear that persons may be prevented from voting in Virginia, not solely because they cannot afford to pay the poll tax, but because they do not pay at the right time. By using an arbitrary and irrational time standard as a basis for determining voter eligibilty, the State unquestionably denies the franchise to many otherwise qualified persons. Regardless of whether the six-month deadline for payment of the poll tax, standing alone, would be grounds for attacking the statutory scheme, when viewed in relation to the other discriminatory features of the poll tax laws, the six-month requirement is further evidence of the incompatibility of these laws with the Fourteenth Amendment.

c. *Exemptions.* Pre-payment of poll taxes is not uniformly required as a prerequisite of voting in Virginia. As the result of tax exemptions, there are more favorable conditions of voting eligibility for some classes of persons than for others. Among the several classes of persons exempt from payment of poll taxes, but who are nevertheless entitled to vote in elections held in the State are: members of the armed forces (Art. XVII, Va. Const.;

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[27] Ogden, *supra*, 50-52.

[28] *Id.* at 45.

§ 24-23.1, Code of Va., 1950); persons pensioned by the State for military service (§ 173, Va. Constitution, § 58-49, Code of Va., 1950); Civil War veterans, their wives and widows (§ 22, Va. Const.); persons moving into the State since January 1 (the assessment date)[29] of the year preceding the election (Op. Va. Atty. Gen. 1963, 80-81); persons honorably discharged from the armed forces since January 1 of the year preceding the election (§ 24-23.2, Code of Va., 1950);[30] and persons reaching the age of 21 after January 1 the year of the election (§ 20, First, Va. Const.; § 24-67(a), Code of Va., 1950; Op. Va. Atty. Gen. 1963, 75).

Virginia's right to create exemptions from its tax laws is undisputed, but when those exemptions place the classes of persons affected in a favored position insofar as eligibility to vote is concerned, it not only results in discrimination between the classes, but further emphasizes the lack of rational relationship between payment of the poll tax and one's capability to vote. Manifestly, payment of the tax is not a qualification for voting if so many classes of persons are permitted to vote without paying it. The fact that there are numerous exemptions also provides further demonstration of the lack of validity to the rationale of *Campbell* v. *Goode, supra,* i.e. that payment of the poll tax is indicative of a person's interest in government. There is no reason for assuming that the widow of a Civil War veteran, who does not have to pay the tax in order to vote, is any more interested in the affairs of government than, for instance, appellant Curtis Burr who cannot afford to pay the requisite amount.

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[29] § 58-4, Code of Virginia, 1950.

[30] There is no prohibition under Virginia law against voting by a dishonorably discharged veteran of the armed forces; except, he must pay the poll tax. Cf. *Carrington* v. *Rash, supra,* where the entire class of military personnel was placed under a disability by the State's voting laws, rather than as in Virginia where only part of the class—those with dishonorable discharges—is penalized.

D. The Court's decision herein should not be controlled by the holding in Breedlove v. Suttles

In the preceding discussion it has been shown that the Virginia requirement that poll taxes be paid as a prerequisite of voting in state and local elections is invalid under the Due Process and Equal Protection clauses of the Fourteenth Amendment. The principal remaining question concerns the relation to this case of the 1937 decision in *Breedlove* v. *Suttles,* 302 U.S. 277, which the District Court held was controlling here. It is hardly necessary to point out the difficulty, if not the impossibility, of reconciling the point of view reflected in the *Breedlove* opinion with the more recent decisions of the Court which have laid great stress on the preferred status of the right to vote and the protections accorded it under the Constitution. The *Breedlove* case was decided prior to the reapportionment and voting rights cases beginning with *Baker* v. *Carr,* 369 U.S. 186, and also prior to the line of authority represented by *Griffin* v. *Illinois, supra,* and *Douglas* v. *California, supra,* holding that under the Equal Protection Clause persons may not be discriminated against on economic grounds. Accordingly, with due respect to the Court, the appellants believe that *Breedlove* fails to reflect accurately the current state of the law. Furthermore, the Court in *Breedlove* showed a preoccupation with the question of whether voting is a privilege or immunity of national citizenship, and concluding that it was not, treated the Georgia poll tax laws as merely a permissible exercise of the State's taxing power.[31]

The keystone of the decision in *Breedlove* is the Court's declaration that the "[p]rivilege of voting is not derived from the United States, but is conferred by the State." 302 U.S. at 283. As the Court subsequently pointed out, however, this statement is true only in a "loose sense." *United States* v. *Classic, supra,* 313 U.S. at 315. In the

[31] The Georgia poll tax was repealed in 1945. Ogden, *supra,* 185.

Classic case, indeed in *Breedlove* itself, the Court acknowledged that a State's authority to grant or restrict the right of suffrage is circumscribed both by congressional authority to legislate on the subject, as well as other limitations embodied in the Constitution. In the *Breedlove* opinion the Court specifically noted that the Fifteenth and Nineteenth Amendments constitute restraints on state action with respect to voting laws. The Court gave scant weight, however, to what is now settled beyond peradventure, namely, that the Fourteenth Amendment likewise places definable limitations on state abridgment of voting rights. *Baker* v. *Carr, supra; Carrington* v. *Rash, supra.*[32]

In *Lassiter* v. *Northampton County Board of Elections, supra,* 360 U.S. at 50-51, the Court restated the guiding principle in somewhat modified form as follows: "The

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[32] It has been suggested that whatever is the case with regard to federal elections, the right to vote in state and local elections, particularly, derives solely from the State. If true, this would make a nullity of Article IV, Sec. 4 of the Constitution, under which the United States guarantees to every State "a republican form of government." As the Court noted in *Baker* v. *Carr, supra,* 369 U.S. at 226, although cases raising the bare question of what constitutes a republican form of government have traditionally been dismissed as nonjusticiable, where the question "is the consistency of state action with the Federal Constitution," federal courts have the power to inquire into matters otherwise within the State's domain. The plain meaning of the Guaranty Clause indicates, at the very least, that a State may not exercise its authority over the franchise in such a way as to abolish the right to vote, and thereby do away with the republican form of government within its borders. State action with respect to voting rights, therefore, is not insulated from judicial review by the assertion that voting is not a privilege or immunity of national citizenship. By virtue of the Guaranty Clause, there is an underlying federal protection of the right to vote at the state level, and where, as here, violations are alleged of rights which, under the Fourteenth Amendment, are "well developed and familiar," it is open to the courts to determine the merits of the claim. *Ibid.*

States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, absent of course the discrimination which the Constitution condemns."[33] The Court held in the *Lassiter* case that although a State has "wide scope for exercise of its jurisdiction," standards of reasonableness and rationality must be adhered to "in determining the qualifications of voters." 360 U.S. at 51. The appellants have already shown the discriminatory and irrational nature of the Virginia poll tax laws. Suffice it to say here, that payment of the poll tax obviously is not a test of a person's qualifications to vote within the meaning of the *Lassiter* case, for unlike the voter literacy test at issue there, the poll tax is completely unrelated to fitness or capacity to participate in public affairs. This is what distinguishes use of the tax today as a prerequisite to voting from its historic use which was cited by the Court in *Breedlove* as a basis for sustaining the constitutionality of the Georgia tax.

In the Colonial period in this country, property and tax-paying requirements imposed as a condition of voting were intended to be indices of education and status, and of one's stake in the community. During the late 18th and early 19th centuries, however, the poll tax came into use as a prerequisite to voting as part of a movement of extending the franchise to a larger number of people; payment of the tax was made a condition of voting in lieu of property

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[33] The Court, in *Lassiter*, also summarized the provisions of the Constitution from which the States derive their authority in election matters, including Article I, Sec. 2 and Seventeenth Amendment which provide that the electors in each State for members of the House of Representatives and Senate "shall have the qualifications requisite for electors of the most numerous branch of the state legislature."

or other taxpaying qualifications.[34] Ultimately, however, the poll tax requirement fell into disuse, and by the time of the Civil War it was virtually extinct.[35] In sum, although the tax originally signified an expansion of the suffrage—a democratizing move—as previously shown, following the Reconstruction, it was resorted to again, but then as a device to restrict suffrage. Moreover, by that time, the characteristics of a mobile and industrial society had rendered the poll tax useless as a test of political capacity.[36]

Contrary to the impression gained from the Court's decision in the *Breedlove* case (302 U.S. at 283-284), as shown by the foregoing summary, history provides little justification for the poll tax as a prerequisite to voting. The Court's opinion in *Breedlove* similarly, in the appellants' view, contains a misleading discussion of the validity of the tax as an exercise of the State's taxing power. For, rather than identifying the tax for what it is—a clog on the franchise[37]—the Court merely treats its exaction before registration and voting as a permissible device which

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[34] New Hampshire was the only state with a poll tax as a voting prerequisite at the time the Constitution was adopted. See, Porter, *A History of Suffrage in the United States,* 1-46 (1918); Note, 53 Harv. L. Rev. 645, 646-647 (1940). The requirements for voter eligibility contained in the constitutions and colonial charters of the original 13 States are set forth in Hearings before Subcommittee of the Senate Committee on the Judiciary on S. J. 25, 83rd Cong., 2nd Sess. (1954) 9-16.

[35] Porter, *supra,* 111; 53 Harv. L. Rev., *supra* at 647.

[36] Compare the standard voting qualifications in most States today, such as age, citizenship and residence, which are valid tests of capacity to participate in public affairs.

[37] The Court finds that the Georgia tax was not imposed "for the purpose of denying or abridging the privilege of voting" (302 U. S. at 282). This contrasts with the express acknowledgment of the court in *Campbell* v. *Goode, supra,* that the Virginia tax was intended to restrict the suffrage, and not to raise revenue.

"serves to aid collection from electors desiring to vote."[38] 302 U.S. at 283. The opinion in the *Breedlove* case, in short, in addition to failing to accord due recognition to the inherently restrictive effect that the poll tax has on the exercise of the franchise, does not take into account the overriding effect on state voting laws of the limitations imposed by the Constitution, principally the Fourteenth Amendment. For all of the foregoing reasons, the appellants submit, the *Breedlove* decision should not be adhered to, and should not control the determination of this case.

II. PROVISIONS OF VIRGINIA LAW WHICH DISQUALIFY "PAUPERS" FROM REGISTERING AND VOTING ARE INVALID UNDER THE FOURTEENTH AMENDMENT

In their complaint in the District Court, the appellants, in order to establish their standing to challenge the Virginia poll tax laws, alleged that they wished to register and vote and that they were qualified to do so in all respects, except that they lacked the economic means to pay the poll taxes required of them by the laws of Virginia. Allegations were included in the complaint to substantiate the appellants' claim of poverty, and pursuant to applications made to the District Court, the appellants were granted leave to proceed in *forma pauperis* (R. 1). In pleadings filed by appellees, the defense was raised that the appellants lacked standing to challenge the constitutionality of the poll tax, because on the basis of their own admissions it appeared that they were "paupers," and that they were hence disqualified from voting under the Virginia constitutional and statutory provisions specifying persons of this description as being ineligible to

[38] Citing *Mangano Co.* v. *Hamilton*, 292 U.S. 40, 44. However, a State may not use its taxing power to accomplish ends which are beyond its constitutional authority. *Child Labor Tax Case*, 259 U.S. 20, 38-44; *Hill* v. *Wallace*, 259 U.S. 44, 67-68; *United States* v. *Constantine*, 296 U.S. 287, 295-296; Cf. *United States* v. *Kahriger*, 345 U.S. 22, 31, n. 10, 37-38 (dissenting opinion of Justice Frankfurter).

register or vote in the State. The appellants thereupon, with leave of the District Court, amended their complaint to allege the unconstitutionality of Section 23 of the Constitution of Virginia and Section 24-18 of the Virginia Code, insofar as they name "paupers" among the classes of persons disenfranchised.

The unconstitutionality of the pauper disqualification in the Virginia election law cannot be seriously disputed. As shown *supra*, pp. 18-22, the State, by requiring poll tax payments as a prerequisite to voting, denies the franchise to many persons who lack the economic means to pay the tax. As if to emphasize this unconstitutional delineation "between rich and poor," *Douglas* v. *California, supra,* 372 U.S. at 357, the State has also specifically excluded "paupers" from exercise of the suffrage. This provision is so manifestly discriminatory and therefore invalid under the Fourteenth Amendment as to be unworthy of extended discussion. *Douglas* v. *California, supra; Griffin* v. *Illinois, supra; Carrington* v. *Rash, supra.*[39]

The appellees, before the District Court, offered no justification or defense for the "pauper" disqualification. Nor did they supply any definition of what limits there are to the class covered by this vague and indefinite term. The Virginia Attorney General, however, who represented the appellees, maintained throughout the lower court proceeding that the disqualification is "valid, constitutional and enforceable," and that as a result of their admission of poverty, the appellants come within the meaning of the term and are accordingly ineligible to vote in the State (R. 25, 27-30).

---

[39] Justice Harlan, in his dissenting opinion in *Douglas* v. *California*, noted in words applicable to the "pauper" disqualification that "The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' *as such* in the formulation and application of their laws." (Emphasis in original). 372 U.S. at 361.

With the issue thus joined, the appellants submit that the District Court erred in dismissing the complaint with respect to this phase of the case. The assertion by the State that the disqualification applies to the appellants creates sufficient threat that they will be discriminatorily denied the franchise, to warrant a judicial declaration, as prayed for, that the provision is unconstitutional, as well as injunctive relief to restrain its enforcement. It is no answer to say, as the District Court did, that the appellants are without standing to challenge the "pauper" disqualification, because of the lack of showing that it has been employed in the past to prevent them or members of their class from voting. The record of this case shows that not only the poll tax requirement, but also the "pauper" disqualification, as construed by the State's Attorney General, are absolute barriers to exercise of the franchise by the appellants and members of their class. Even if the poll tax is held by this Court to be unconstitutional, the Attorney General's contention that these appellants fall within the definition of "pauper" will presumably be raised as a bar to their voting in future elections—both federal and state—since the disqualification is applicable to both kinds of elections. This threat of irreparable and continuing denial of voting rights warrants the granting of the equitable relief prayed for. *Pierce* v. *Society of Sisters*, *supra*, 268 U.S. at 534, 536; *Terrace* v. *Thompson*, 263 U.S. 197, 214, 215; *Truax* v. *Raich*, *supra*, 239 U.S. at 39. Further, a suit contesting the constitutionality of a state election law is particularly appropriate for adjudication under circumstances such as are posed here, for once an election occurs, there is no chance of retrieving the right which has been lost, and the possibility of mootness becomes a threat to the success of subsequent litigation. Cf. *Shub* v. *Simpson*, 340 U.S. 861, 862 (dissenting opinion); *Mills* v. *Green*, 159 U.S. 651; *Love* v. *Griffith*, 266 U.S. 32.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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September 1965.

APPENDIX

The provisions of the Virginia Constitution which are involved (in relevant part) are as follows:

Section 18. Qualifications of voters.—Every citizen of the United States, twenty-one years of age, who has been a resident of the State one year, of the county, city or town, six months, and of the precinct in which he offers to vote, thirty days, next preceding the election in which he offers to vote, has been registered, and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people; * * *

Section 20. Who may register.—Every citizen of the United States, having the qualifications of age and residence required in section eighteen, shall be entitled to register, provided:

First. That he has personally paid to the proper officer all State poll taxes legally assessed or assessable against him for the three years next preceding that in which he offers to register; or, if he came of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, has paid one dollar and fifty cents, in satisfaction of the first year's poll tax asessable against him; * * *

Section 21. Conditions for voting.—A person registered under the general registration of voters during the years nineteen hundred and two and nineteen hundred and three, or under the last section, shall have the right to vote for all officers elective by the people, subject to the following conditions:

That unless exempted by section twenty-two, he shall, as a prerequisite to the right to vote, personally pay, at least six months prior to the election, all State poll taxes assessed or assessable against him, under the Constitution,

during the three years next preceding that in which he offers to vote. * * *

Section 22. Persons exempt from payment of poll tax as condition of right to vote.—No person, nor the wife or widow of such person, who, during the late war between the States, served in the army or navy of the United States, or of the Confederate States, or of any State of the United States, or of the Confederate States, shall at any time be required to pay a poll tax as a prerequisite to the right to register or vote. The collection of the State poll tax assessed against anyone shall not be enforced by legal process until the same has become three years past due.

Section 23. Persons excluded from registering and voting.—The following persons shall be excluded from registering and voting: Idiots, insane persons and paupers; persons who, prior to the adoption of this Constitution, were disqualified from voting, by conviction of crime, either within or without this State, and whose disabilities shall not have been removed; persons convicted after the adoption of this Constitution, either within or without this State, of treason, or of any felony, bribery, petit larceny, obtaining money or property under false pretenses, embezzlement, forgery or perjury; persons who while citizens of this State, after the adoption of this Constitution, have fought a duel with a deadly weapon, or sent or accepted a challenge to fight such a duel, either within or without this State, or knowingly conveyed such a challenge, or aided or assisted in any way in the fighting of such duel.

Section 38. Duties of treasurers, clerks of circuit and corporation courts and sheriffs in regard to making, filing, delivering and posting list of paid poll taxes; how corrected.—The treasurer of each county and city shall, at least five months before each regular election, file with the clerk of the circuit court of his county, or of the corporation court of his city, a list of all persons in his county or city, who have paid not later than six months prior to such

election, the State poll taxes required by this Constitution during the three years next preceding that in which such election is held; which list shall be arranged alphabetically, by magisterial districts in the counties, and in such manner as the General Assembly may direct in the cities, shall state the white and colored persons separately, and shall be verified by the oath of the treasurer. The clerk, within ten days from the receipt of the list, shall make and certify a sufficient number of copies thereof, and shall deliver one copy for each voting place in his county, or city, to the sheriff of the county or sergeant of the city, whose duty it shall be to post one copy, without delay, at each of the voting places, and, within ten days from the receipt thereof, to make return on oath to the clerk, as to the places where and dates at which said copies were respectively posted, which return the clerk shall record in a book kept in his office for the purpose; and he shall keep in his office, for public inspection, for at least sixty days after receiving the list, not less than ten certified copies thereof, and also cause the list to be published in such other manner as may be prescribed by law. The original list returned by the treasurer shall be filed and preserved by the clerk among the public records of his office for at least five years after receiving the same.

Within thirty days after the list has been so posted, any person who shall have paid his capitation tax, but whose name is omitted from the certified list, may after five days' written notice to the court of his city, or to the judge thereof in vacation, to have the same corrected and his name entered thereon, which application the court or judge shall promptly here and decide.

The clerk shall deliver, or cause to be delivered, with the poll books, at a reasonable time before every election, to one of the judges of election of each precinct of his county or city, a like certified copy of the list, which shall be conclusive evidence of the facts therein stated for the

purpose of voting. The clerk shall also, within sixty days after the filing of the list by the treasurer, forward a certified copy thereof, with such corrections as may have been made by order of the court or judge, to the officer designated by law, who shall charge the amount of the poll taxes stated therein to such treasurer, unless previously accounted for.

Further evidence of the prepayment of the capitation taxes required by this Constitution, as a prerequisite to the right to register and vote, may be prescribed by law.

* * * * * * * * * *

The provisions of the Virginia statutes (1950 Code, as amended) which are involved (in relevant part) are as follows:

Section 24-17. Persons entitled to vote at all general elections.—Every citizen of the United States twenty-one years of age, who has been a resident of the State one year, of the county, city or town, six months, and of the precinct in which he offers to vote thirty days next preceding the general election, in which he offers to vote, has been duly registered under the provisions of Section 24-67, and who, at least six months prior to such election in which he offers to vote, has personally paid to the proper officer all State poll taxes assessed or assessable against him for the three years next preceding the year in which such election is held, and is otherwise qualified, under the Constitution and laws of this State, shall be entitled to vote for members of the General Assembly and all officers elective by the people.
* * *

Section 24-18 Persons disqualified from registering and voting.—The following persons shall be excluded from registering an dvoting: Idiots, insane persons and paupers; persons who, prior to the adoption of the Constitution, were disqualified from voting by conviction of crime, either within or without the State, and whose disabilities shall not have been removed; persons convicted after the adoption of the Constitution, either within or without this State,

of treason, or of any felony, bribery, petit larceny, obtaining money or property under false pretenses, embezzlement, forgery or perjury; persons who, while citizens of this State since the adoption of the Constitution, have fought a duel with a deadly weapon, or sent or accepted a challenge to fight such duel, either within or without this State, or knowingly conveyed a challenge, or aided or assisted in any way in the fighting of such duel. * * *

Section 24-22. Qualifications of voters at special elections.— The qualifications of voters at any special election shall be such as are hereinbefore prescribed for voters at general elections, but at any such special election, held before the second Tuesday in June in any year, any person shall be qualified to vote who was so qualified at the last preceding regular November election, or who is otherwise qualified to vote, and has personally paid, at least six months prior to the second Tuesday in June of that year, all State poll taxes assessed or assessable against him during the three years next preceding that in which such special election is held, and at any such special election, held on or after the second Tuesday in June in any year, any person shall be qualified to vote who is or was qualified to vote at the regular election held on the Tuesday after the First Monday in November of that year. * * *

Section 24-67. Who to be registered for all elections.— (a) Each registrar shall register pursuant to the provisions of this paragraph every citizen of the United States, of his election district, who shall apply in person to be registered at the time and in the manner required by law, who at the time of the next general election, shall have the qualifications of age and residence required in Section 18 of the Constitution of Virginia, and who has paid to the proper officer all State poll taxes assessed or assessable against him for the three years next preceding the year in which such election is held, or if he come of age at such time that no poll taxes shall be assesable against him for

the year preceding the year in which he offers to register, has paid one dollar and fifty cents in satisfaction of the year's poll tax assessable against him. * * *

Section 24-120. Treasurer to file lists with clerk.—The treasurer of each county and city shall, at least five months before the second Tuesday in June in each year in which a regular June election is to be held in such county or city, and at least one hundred and fifty-eight days before each regular election in November, file with the clerk of the circuit court of his county or the corporation court of his city (1) a list of all persons in his county or city who have filed certificates of residence under section 24-172, and (2) a separate list of all persons in his county or city who have paid not later than six months prior to each of such dates the State poll taxes required by the Constitution of this State during three years next preceding that in which such election is to be held, which lists shall state the white and colored persons separately, if known, and shall be verified by the oath of the treasurer. The treasurer shall, in each such list, designate as a tribal Indian any person who requests to be so designated and who shall have furnished the treasurer with an affidavit, made by the Chief of any Indian tribe existing in this State, that such person is a member of such tribe and to the best knowledge and belief of the Chief is a tribal Indian as defined in Section 1-14 of the Code of Virginia. * * *

BRIEF FOR APPELLEES

OCT 11 1965

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 48

ANNIE E. HARPER, ET AL.,
Appellants,

v.

VIRGINIA STATE BOARD OF ELECTIONS, ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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IN THE

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October Term, 1965

No. 48

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Appellants,

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VIRGINIA STATE BOARD OF ELECTIONS, ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF FOR APPELLEES

STATEMENT

This case was heard and decided below on a Motion to Dismiss (R. 17, 33), without any evidence as to the administrative procedures for assessment and payment of poll taxes in Virginia or their practical operation and effect (see pp. 5-6 of unprinted transcript of hearing on October 21, 1964).

The only question presented, accordingly, is whether the non-discriminatory requirement for a poll tax as prescribed by the Constitution and statutes of Virginia is unconstitutional on its face as applied to State elections.

Both the Government and the Appellants, however, deal at length in their briefs with assertions wholly unsupported

by proof with regard to the operation of the poll tax and election laws in Virginia (Gov. 6-13, 31-40; App. 18-27). In addition the Government invites the Court to notice various statistics unavailable at the time of the hearing below (Br. 47-49, App. B) and a deposition of Judge C. H. Morrissett, the Virginia State Tax Commissioner, taken after the hearing below (Br. 11, App. C).

Being unsure whether the Court will look only to the face of the statutes or notice these extrinsic matters, we have no choice except to invite the attention of the Court to the still more recent and comprehensive deposition of Judge Morrissett attached as Appendix A. This was taken in *United States of America* v. *Commonwealth of Virginia et als.*, E.D. Va., Civil Action 4423, on September 27, 1965, with the Government and the Commonwealth both represented.*

The salient point in this authoritative exposition of the poll tax in actual operation is the illusory nature of the complications stressed by the Government (Br. 9-13). It is by no means necessary for any prospective voter to make an advance determination of the date of any special election or of any local election or of any general election. All he need do is to pay the poll tax on or before the fourth day of December and, having been duly registered, he may vote in every regular election, whatever its nature, held six months or more thereafter.** The poll tax is assessed

*That is a proceeding by the Attorney General in accordance with the Voting Rights Act of 1965, 79 Stat. 437. It broadly attacks the poll tax and election laws of Virginia on various grounds, including those argued in this appeal. Evidence is still being taken.

** Municipal elections are normally held in June, primary elections for State and local constitutional officers and members of Congress in July and general elections for State and local constitutional officers and members of Congress, as well as presidential elections, in November. A voter who has paid his poll tax by the required date of December 4 would have paid it more than 6 months in advance of the earliest of these elections.

or assessable as of January 1 in each year (Va. Code §58-4) and is payable on or before the fourth day of each December (Va. Code §58-963). Having so paid it, any citizen may register to vote at any time up to 30 days before the election (Va. Code §§24-67, 24-74, 24-76). If by any chance he is not assessed, he will be on request (Va. Code §58-1163). Once on the tax roll, he will be billed annually from then on (App. A, p. 7).

The tax is not applied discriminatorily as against the Negro race or any other group. It is applied with all the energy and effort that it is practical to expect of local officials, utilizing tax lists of previous years, tangible personal property returns, automobile registrations and any other information available to the Commissioner of Revenue (App. A, p. 3).

In short, many more people pay the tax than vote and anyone who wishes to vote may pay the tax. By doing so he indicates his continued residence, his civic interest and his support of State revenue requirements (App. A, p. 7).

The poll tax in Virginia is, therefore, as mechanical as the calendar. All that anyone has to do is to pay the sum of $1.50 some time between January 1 and December 4 of each year and thereupon he is entitled to register and to vote in all regular elections.

SUMMARY OF ARGUMENT

I.

Suffrage is Not a First Amendment Right.

Free Speech within the meaning of the First Amendment is the privilege of saying what one thinks, short of imminent danger to the state. The other "freedoms" specifically enumerated in the First Amendment enjoy the same preferred status. Yet the Amendment has never been considered or suggested to be, as the Government now urges, "a comprehen-

sive charter of freedom of political expression," having as its keystone an unrestricted right to vote. Any such interpretation would repeal Article I, Section 2, of the Constitution and overturn decisions and practices that have been considered fundamental since the foundation of the Republic. It is, moreover, self-contradictory in that the keystone right admittedly may be made subject to numerous limitations, such as residence, literacy, *etc.*, while no one would assert that the subordinate right to speak one's mind may be limited to residents, persons who are literate, *etc.* The right to assemble and petition for grievances is not a ticket to the voting booth, but a substitute for it. And what was advanced as a shield against the Federal Government to induce ratification of the Constitution cannot be converted into a sword against the States.

2.

THE FOURTEENTH AMENDMENT DOES NOT LIMIT THE STATES' POWER TO PRESCRIBE VOTER QUALIFICATIONS.

The Fourteenth Amendment was deliberately written in terms that do not relate to any aspect of suffrage except to permit any provisions in that regard that the States had adopted or might later adopt and to impose a deterrent by reduction of congressional representation in proportion to any denial of suffrage to adult male citizens. This was explicitly declared in Congress and well understood by the ratifying States. It has been corroborated by a series of further amendments which have specifically changed the Constitution in every case of a change in suffrage qualifications, first race, then sex and last poll tax in Federal elections. In all other respects the soverign power of the States to determine suffrage qualifications, and especially in State elections, has been uniformly recognized by this Court.

Recent decisions have not undermined this doctrine but merely determined that once a voter is qualified, he is entitled to cast his ballot and have it fairly counted or that, all other residence qualifications being met, their normal consequence for voting cannot be denied in perpetuity on the mere ground of service in the armed forces of the United States.

3.

THE POLL TAX DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

In contrast to such a permanent disqualification of a particular class, the poll tax establishes a procedure of qualification open to all the world to satisfy on reasonable effort. It was well known and widely required when the Fourteenth Amendment was adopted and since. In particular, the Virginia system affords a non-discriminatory, objective test of minimum intelligence for ordering one's own affairs and participating in those of state, requiring no more than a token payment of $1.50 by December 4 of each year, guaranteeing against the abuses of subjective judgment and operating in a manner "as mechanical as the calendar." Requirements of this nature have been sustained since the adoption of the Constitution. If a change be desired in State election procedure, it should be made by constitutional amendment as the Twenty-fourth Amendment did in the case of Federal election procedure rather than by proliferation of adjectives and analogies before this Court.

The underlying question is whether the Federalist system on which our Republic was founded shall be maintained and confirmed by requiring the amendment procedure to be followed or abolished by irrevocable sentence of this Court, ignoring the prescribed constitutional procedures as well as the risks of survival that the resulting concentration of power would entail.

4.

THE QUESTION OF PAUPERS IS NOT PRESENTED.

The term being now undefinable and there being no effort time out of mind to enforce it, the issue, as found below, is "entirely academic and without place here."

ARGUMENT

1.

SUFFRAGE IS NOT A FIRST AMENDMENT RIGHT.*

It is understandable that, in the words of the Government (Br. 19), "the right to vote in State elections is nowhere expressly conferred in the Constitution." The Constitution was ratified by the assent of sovereign States that were conferring, withholding and regulating the right to vote in State elections as they saw fit, and manifestly proposed to continue doing so. This was recognized in terms by Article I, Section 2, providing that members of the House of Representatives should be chosen "by the People of the several States," not in any case by *all* the people, but on the contrary

> ". . . the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

This in terms left unimpaired to the States their original sovereign power to determine the qualifications requisite

* The First Amendment argument now made by the Government and Appellants was not even alluded to in the proceeding below, nor was it mentioned in Appellants' Jurisdictional Statement on the basis of which probable jurisdiction was noted. Though clearly transcending Rule 40(1)(d) of the Rules of this Court, this argument is made the cornerstone of the case for the Government and the Appellants. So we have no choice except to answer it.

for electors in all State and local elections so long as a republican form of government is maintained in accordance with Article IV, Section 4. Absent any amendment, it further guaranteed that these qualifications should equally control in electing members of the House.*

There was such widespread opposition to the proposed new Constitution that its ratification was a close piece of business, particularly in the key States of Massachusetts, Virginia and New York, without whose assent the instrument would have proved ineffectual. Even then ratifications were obtained only by the general assurance that the limitation of the new Federal government to the powers expressly delegated to it and the retention of all other powers by the assenting States would be expressly emphasized by immediate adoption of the first ten Amendments. The Tenth Amendment (which hardly merits its present repute of "the forgotten amendment") fulfills this assurance by the express provision that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

* There can be no question as to the intent of the original Framers; Article I, Section 2 represents a compromise reached by the members of the Constitutional Convention of 1787. While they realized that the matter of qualifications of electors of the Congress was too important to be omitted entirely from the Constitution, they also were aware that to create uniform standards for a national electorate, or to give Congress the power to create such standards, would arouse powerful opposition in the States. See Elliott, "Debates on the Adoption of the Federal Constitution" Vol. 5, pp. 385-88 (1866). Consequently they adopted Article I, Section 2 as a compromise intended to promote stability and uniformity as fully as possible consistently with adopting the qualifications fixed by the several States for voting for their own popular assemblies as the qualifications for voting for members of the House of Representatives. See The Federalist, No. 52, 342 (Modern Library ed.).

The First Amendment provides in well considered language that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

While it is normal to read simple words simply and as meaning what they say, this is not the approach of the Government (Br. 19-21, 38-39) or the Appellants (Br. 14-17). For the first time in the 176 years that have elapsed since the First Amendment was adopted, its words are now embellished and elaborated into "a comprehensive charter of freedom of political expression." The scope and content of this vague charter are nowhere described for the edification of the Court or the citizenry. Nowhere is there an explanation why the simple language of the First Amendment should be abandoned in favor of "broad, abstract and ambiguous concepts" newly discovered by opponents of the poll tax.* At this moment we are told only that the supreme freedom protected by this new First Amendment is that of voting.

Voting is, in short, guaranteed to all the people by the First Amendment. That is the cornerstone of the Government's case and of Appellants'.

We think this untenable, for these reasons:

1. If it be granted that the right of suffrage is the supreme expression of political freedom, it would certainly have

* It has recently been pointed out with great force and clarity that the introduction of such concepts can be quite dangerous. What is today urged by the Government as a vast expansion of Federal power over the States may tomorrow be interpreted as a restrictive ban on all governmental power, *Griswold* v. *Connecticut*, 381 U.S. 479, 509-10 (1965) (Black, J., dissenting).

been mentioned, and mentioned first of all, if the First Amendment had been designed to operate as a comprehensive charter of political freedom.

2. The only "freedoms" unconditionally protected by the First Amendment were freedom of religion and "freedom of speech, or of the press," none of which is exclusively or even distinctively political in character, and plainly they do not include or contemplate the right to vote. The only other right safeguarded in the First Amendment is the right of assembly and petition for redress of grievances, historic practices of consultation and remonstrance which have never been deemed to include the right to vote and might indeed have been wholly unnecessary if a general right to vote had existed.

3. To argue that the First Amendment could have been written better, or should have been written better, or indeed that it is "not meaningful" (Gov. Br. 20) unless supplemented, cannot change what the First Amendment says, but is only an appeal for a further amendment in the manner appointed by law.

4. The First Amendment, being designed solely and expressly as a limitation on Congress alone, in order to induce ratification by the States, could not conceivably have been taken to overturn or limit the fundamental premise of Article I, Section 2, that each State should determine for itself the qualifications requisite for electors.

5. This contemporaneous construction, to which special weight is ordinarily accorded, was continuously accepted and again corroborated in 1913 by the Seventeenth Amendment adopting, in the case of the Senate, the identical words that:

"The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

6. The restrictions imposed on Congress by the First Amendment cannot be transposed into a limitation on the States by resort to the vague contours of the Fourteenth Amendment unless its words and history reveal such a design, which in fact, as we show below (p. 13), they wholly fail to do but rather demonstrate the contrary.

In short, the First Amendment does not deal in any way with suffrage and has no application to the States in that regard. Were these premises untrue, it would have been wholly unnecessary to adopt the Fifteenth Amendment, the Nineteenth Amendment and the Twenty-fourth Amendment, all of which specifically outlaw particular regulations by the States of the privilege of suffrage. If another amendment is desired, the procedure is well known. It does not consist of urging adjectives and analogies on this Court.

There are, of course, no authorities to support the Government's position on this central point. The cases cited by it or the Appellants merely hold that there can be no prohibition of communications under the Free Speech Clause* and that the right of assembly may not be ob-

*_Edwards_ v. _South Carolina_, 372 U. S. 229 (1963), held that the States cannot make a criminal offense of the mere peaceable expression of ideas, no matter how obnoxious and inflammatory they may be to bystanders. _Lamont_ v. _Postmaster General_, 381 U. S. 301 (1965), held that Congress could not condition the right to receive what was deemed "communist political propaganda" upon a written request of the addressee that it be delivered. _Thomas_ v. _Collins_, 323 U. S. 516 (1945), held unconstitutional the application of a statute licensing solicitation by labor organizers to a speaker advocating unionism. _Martin_ v. _City of Struthers_, 319 U. S. 141 (1943), held unconstitutional an ordinance unconditionally prohibiting door-to-door distribution of pamphlets. _Eastern Railroad Presidents Conference_ v. _Noerr_, 365 U. S. 127 (1961), is not even a First Amendment case; it holds only that concerted attempts to effect the enactment of legislation are not within Section 1 of the Sherman Act, 15 U.S.C. § 1.

structed by forbidding steps essential for its exercise,* unless, of course, there is some clear and present danger or other overriding governmental interest**. Other cases are referred to only for isolated phrases out of context, like *Griswold* v. *Connecticut,* 381 U.S. 479, 485 (1965) for the axiom that the States may not "sweep unnecessarily broadly" (Gov. Br. 22). The holding there could not be more remote from any question of suffrage; and indeed it was only that a law forbidding contraceptive information to married persons is unconstitutional†.

So far from being supported by authority, this novel suggestion of the Government and Appellants is in conflict with accepted milestones of Constitutional history. If suffrage is a part of free speech, the same rules must govern both. We know from previous decisions of the Court that the States may require residence as a condition of suffrage, *Carrington* v. *Rash,* 380 U.S. 89, 91 (1965); *Lassiter* v. *Northampton Election Bd.,* 360 U.S. 45, 51 (1959); *cf. Pope* v. *Williams,*

* *Brotherhood of Railroad Trainmen* v. *Virginia,* 377 U.S. 1 (1964) and *NAACP* v. *Button,* 371 U. S. 415 (1963), held that a State may not abridge the right of free association for a lawful purpose under the guise of regulating the practice of law. *NAACP* v. *Alabama,* 357 U. S. 449 (1958), held that the same right could not be abridged by the States by requiring the production of documents pursuant to court order.

** *Schenck* v. *United States,* 249 U.S. 47, 52 (1919); *Cantwell* v. *Connecticut,* 310 U. S. 296, 306-07 (1940); *Martin* v. *City of Struthers,* 319 U. S. 141, 143 (1943).

† Whatever the merits of the statute there involved, it appears that they lie in an area where opinions may differ, so that the inflexibility of a Constitutional pronouncement may in time prove disadvantageous. Thus the National Catholic Welfare Conference said to the Senate Government Operations Committee on August 24, 1965, that a law *providing* contraceptive information would be unconstitutional, both as an invasion of protected privacy and as a discrimination against the Negro race. (New York Times, August 25, 1965, pp. 1, 19; Documentary Service issued by the Press Department, National Catholic Welfare Conference, August 24, 1965.)

193 U.S. 621 (1904); that they may require literacy, *Lassiter* v. *Northampton Election Bd., supra; Guinn* v. *United States,* 238 U.S. 347 (1915); that they may deny suffrage to ex-convicts, *Davis* v. *Beason,* 133 U.S. 333, 346-47 (1890); that they may require age, *Lassiter* v. *Northampton Election Bd., supra,* at 51; and that they may require advance registration, *Mason* v. *Missouri,* 179 U.S. 328 (1900); *Pope* v. *Williams, supra.* But it would hardly be contended that the States may prohibit anyone from speaking his mind in the public parks or circulating his political views through the distribution of pamphlets unless he were a resident of the particular State, or demonstrated some particular level of literacy or had never been a convict, or was adult in point of age or had registered in advance. Indeed, the contrary is established as to: nonresidents, *cf. NAACP* v. *Alabama,* 377 U.S. 288 (1964); ex-convicts, *cf. Cooper* v. *Pate,* 378 U.S. 546 (1964); *cf. Lambert* v. *California,* 355 U.S. 225 (1957); minors, *cf. Abington School Dist.* v. *Schempp,* 374 U.S. 203 (1963); those not registered, *cf. Thomas* v. *Collins,* 323 U.S. 516 (1945). In short, the Court and the country have uniformly considered suffrage as outside the scope of the First Amendment and subject to wholly different considerations, as should rightly be done. Reversal of this premise would reverse decisions and practices that have been deemed fundamental.

The Government concedes the vitality of Article I, Section 2, when it puts its stamp of approval on State voting regulations that disfranchise minors, convicts, non-residents and those who fail to register in advance (Br. 16, 28-29). Yet if the Government's reasoning is followed to its logical conclusion, even these favored regulations must be swept away and Article I, Section 2, rendered a nullity by the new First Amendment "charter of political freedom."

Long ago, the Court observed that it is perfectly well

settled that the First Amendment does not "lay down any novel principles of government." *Robertson* v. *Baldwin,* 165 U. S. 275, 281 (1897). No more novel principle, nor any more destructive of the whole Federalist concept on which our government is based, could be found than the suggestion that the procedure of Constitutional amendment, so carefully followed in every previous instance of change in voter qualifications, may here be shortcut through the simple expedient of insinuating the suffrage right by metaphor into the First Amendment and then reversing it from a shield against the Federal Government to a sword against the States, thus at one stroke annihilating explicit provisions of the Constitution and a century and a half of accumulated experience.

2.

THE FOURTEENTH AMENDMENT DOES NOT LIMIT THE STATES' POWER TO PRESCRIBE VOTER QUALIFICATIONS.

(*a*) *Introduction*

While the Court has decided numerous recent cases in the general area of suffrage and elections, these dealt for the most part with the effect to be given to ballots cast by voters who were admittedly qualified (e.g., the reapportionment cases). In no case where suffrage qualifications as such came up for consideration was the legislative history of the Fourteenth Amendment emphasized in brief and argument.

In these circumstances, we submit that the legislative history merits painstaking consideration in a challenge to the validity of a tax in common usage at the time of enactment and since.

(*b*) *The Text*

The text of the Fourteenth Amendment, while notably vague in certain aspects, is conspicuously clear in that here

relevant. Section 1 contains three clauses, each expressed in very general terms, the Privileges and Immunities Clause, the Due Process Clause and the Equal Protection Clause:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

There is no reference here to suffrage and the omission was deliberate, as our subsequent discussion of the legislative history will demonstrate (p. 15). Rather, Section 2 expressly permits any State to deny or abridge the right to vote for any reason it may choose subject only to a deterrent provision that in such event the population base used in determining Congressional representation of the particular State "shall be reduced in the proportion in which the number of such male citizens [so discriminated against] shall bear to the whole number of male citizens twenty-one years of age in such State." It is elemental to read the whole of a document and give effect to each part. This done, the Fourteenth Amendment leaves no question on this point. Whatever privileges, liberties and protections it may have contemplated, it was designed to exclude suffrage in all its aspects.

Yet the Government (Br. 15-23) and Appellants (Br. 17-26), while standing with their right foot on the First Amendment, place their left on the Fourteenth. As we have seen, the words give no support, indeed disclaim it. But in view of the heavy weight nevertheless put on the Fourteenth Amendment, we turn now to history. Our purpose here is to show that this is not an evolving situation, where the Court must adjust a general principle to progressive changes of

industrial technique, as the Commerce Clause grew from post roads to television channels, but rather to show that suffrage requirements were explicitly disavowed by the Framers as being beyond the purpose or reach of the Fourteenth Amendment and excluded for deliberate reason. The facts being so, it is not possible to reverse this meaning except by amending the Constitution.

(*c*) *Proceedings in Congress*

The text of the Amendment was drafted by the Joint Committee of Fifteen on Reconstruction. When it was introduced by Representative Thaddeus Stevens on the floor of the House, some of the Representatives expressed disappointment that the Amendment did not in terms confer suffrage upon the Negro, but the reason for its failing in this respect was explained by Stevens in his introductory speech:

> "I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to be consulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this." Congressional Globe, 39th Cong., 1st Sess. (1866) (hereinafter cited as Globe) 2459.

But it was hoped that the second section would tend to bring about universal male suffrage. As Stevens immediately continued, *id.*:

> "If any State shall exclude any of her adult male citizens from the elective franchise, or abridge that right, she shall forfeit her right to representation in the same proportion. The effect of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in

a hopeless minority in the national Government, both legislative and executive."

Three days later Representative Bingham, "the Madison of the first section of the Fourteenth Amendment," *Adamson* v. *California*, 332 U.S. 46, 74 (1947) (Black, J., dissenting), closed the House debate by summarizing the provisions of the Amendment:

> "The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.
>
> "Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. *The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.*

> "*The second section excludes the conclusion that by the first section suffrage is subjected to congressional law;* save, indeed, with this exception, that as the right in the people of each State to a republican government and to choose their Representatives in Congress is of the guarantees of the Constitution, by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a republican to a despotic government, and thereby deny suffrage to the people." (Globe 2542, emphasis added.)

He summarized the point in these words:

> "To be sure we all agree, and the great body of the people of this country agree, and the committee thus far in reporting measures of reconstruction agree, that *the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States.*" (*Id., loc. cit.*, emphasis added.)

These remarks cannot be taken as the individual views of a few prominent supporters of the Amendment. Debate in the House proceeded with every member except one assuming that under the Amendment the States retained their original constitutional prerogatives over suffrage. The assumption was neither inadvertent nor silent. The remarks of those who spoke on the Amendment show expressly or by unmistakable implication that they shared Bingham's view that although it altered the basis of congressional representation, it left suffrage "exclusively under the control of the States." Excerpts from those remarks may be found in *Reynolds* v. *Sims*, 377 U.S. 533, 625-29 (1964) (Harlan, J., dissenting).

When the Amendment came to the Senate floor for debate, it was introduced by Senator Howard, speaking on

behalf of Senator Fessenden, the Senate Chairman of the Reconstruction Committee. Howard, also a member of the Committee, said:

> "The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man, I had almost called it the poor privilege of the equal protection of the law? Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both equally responsible to justice and to God for the deeds done in the body?
>
> "*But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting.* The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a depotism [sic]." (Globe 2766, emphasis added.)

Addressing himself to the second section of the Amendment, he continued:

> "It is very true, and I am sorry to be obliged to acknowledge it, that this section of the amendment does not recognize the authority of the United States over the question of suffrage in the several States at all; nor does it recognize, much less secure, the right of suffrage to the colored race. I wish to meet this question fairly and frankly; I have nothing to conceal upon it; and I am perfectly free to say that if I could have my own way, if my preferences could be carried out, I certainly should secure suffrage to the colored race to some extent at least; for I am opposed to the exclusion and proscription of an entire race. If I could not obtain universal suffrage in the popular sense of that expression, I should be in favor of restricted, qualified suffrage for the colored race. But, sir, it is not the question here what will we do; it is not the question what you, or I, or half a dozen other members of the Senate may prefer in respect to colored suffrage; it is not entirely the question what measure we can pass through the two Houses; but the question really is, what will the Legislatures of the various States to whom these amendments are to be submitted do in the premises; what is it likely will meet the general approbation of the people who are to elect the Legislatures, three fourths of whom must ratify our propositions before they have the force of constitutional provisions?
>
> * * *
>
> "The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race.
>
> * * *

> *The second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right.*" (*Id., loc. cit.*, emphasis added.)

At another later point during the debate, Senator Howard declared:

> "We know very well that the States retain the power, which they have always possessed, of regulating the right of suffrage in the States. It is the theory of the Constitution itself. That right has never been taken from them; no endeavor has been made to take it from them; and the theory of this whole amendment is, to leave the power of regulating the suffrage with the people or Legislatures of the States, and not to assume to regulate it by any clause of the Constitution of the United States." (Globe 3039.)

Again, debate in the Senate proceeded, as it had in the House, with every member understanding that the Amendment was not to affect the States' power to prescribe qualifications for exercise of the right to vote. Excerpts to this effect may be found in *Reynolds* v. *Sims*, 377 U.S. 533, 629-32 (1964) (Harlan, J., dissenting). Moreover, that understanding was shared by opponents of the measure. Senator Reverdy Johnson of Maryland (which rejected the Amendment when it was presented for ratification) opposed the Amendment but nevertheless agreed with its sponsors as to its effect upon the States' power to regulate suffrage:

> "Again, Mr. President, the measure upon the table, like the first proposition submitted to the Senate from the committee of fifteen, concedes to the States—and that was one of the grounds upon which the honorable member from Massachusetts [MR. SUMNER] voted and spoke against that proposition—not only the right, but the exclusive right, to regulate the franchise." (Globe 3027.)

The second section of the Amendment, he continued, gives plain notice to the States:

> " 'If you exclude any class from the right to vote, we, admitting your power to make the exclusion, say it shall have no other effect whatever than to deduct the number excluded from the whole number which is to constitute the basis of representation. If, therefore, you exclude from the benefit of the franchise any who are citizens of the United States, and twenty-one years or more of age, and inhabitants of the State, who belong to any particular race, or who are of any color contradistinguished from the white man, we admit that you have a right to exclude them, and all we propose to do is to say that to the extent of that exclusion your basis of representation shall be diminished.' " (Globe 3028.)

The Fourteenth Amendment was not enacted in a vacuum. The Senate was fully aware that many States denied suffrage to illiterates, nonresidents, non-taxpayers, paupers and the like. But denials of suffrage to such persons were to be covered by the second section of the Amendment; no one suggested that the first section would render such laws invalid. The following colloquy between Senators Clark and Howard is illustrative:

> "MR. CLARK. If the Senator will pardon me for a moment, I wish to inquire whether the committee's attention was called to the fact that if any State excluded any person, say as Massachusetts does, for want of intelligence, this provision cuts down the representation of that State.
>
> "MR. HOWARD. Certainly it does, no matter what may be the occasion of the restriction. It follows out the logical theory upon which the Government was founded, that numbers shall be the basis of representa-

> tion in Congress, the only true, practical, and safe republican principle. If, then, Massachusetts should so far forget herself as to exclude from the right of suffrage all persons who do not believe with my honorable friend who sits near me [MR. SUMNER] on the subject of negro suffrage, she would lose her representation in proportion to that exclusion. If she should exclude all persons of what is known as the orthodox faith she loses representation in proportion to that exclusion. No matter what may be the ground of exclusion, whether a want of education, a want of property, a want of color, or a want of anything else, it is sufficient that the person is excluded from the category of voters, and the State loses representation in proportion. The principle applies to every one of the States in precisely the same manner." (Globe 2767.)

All these were public statements made in the nation's capital where all attention was focused, printed and distributed throughout the country and supplying the basis for action by the States. They show without question that Section 1 was not intended to limit in any manner or degree the power of the States to determine elector qualifications or disqualifications. The only limitation was that of Section 2, which does not prohibit the States from denying the franchise to persons who fail to pay taxes, or any others, but indeed contemplates that they may and provides a specific penalty in that event.

(*d*) *Ratification by the States*

The proceedings in the legislatures of the several States are not reported as thoroughly as those in Congress. But the available material is supplied in Appendix B. To the extent that gubernatorial messages or committee reports discuss the Amendment, they recognize, with only one exception (by an opponent of ratification), that it "leaves with

the States, as heretofore, the regulation of the elective franchise." Tenn. House J., App. 4 (1866). Section 2 was emphasized particularly since "it ratifies and confirms, for all future time, the power of the States to regulate this question of suffrage." Pa. Legis. Rec., App. XVI (1867). But its penalty provision was criticised both in Massachusetts and in New Hampshire because, as the latter said, it penalized the States

> "... for regulating, in their own way, the right of suffrage—clearly, a State right; a right vital to the theory of our government, and most carefully guarded by the framers of the Constitution." N.H. House J. 177 (1866).

and thus because it might have a tendency

> "... to remove those time-honored restrictions upon the right of voting which the experience of the past has proved to be necessary and just ..." (*Id., loc. cit.*).

This sufficiently epitomizes what was said by the States in ratifying the Fourteenth Amendment. It will be helpful to the Court to look also at what was being done by the States, as distinguished from what was being said, at the time of ratification. We look first to those States that remained in the Union.

At the time the Amendment came up for ratification, 10 of the 23 Union States that ratified it before 1870 either disqualified paupers from voting or prescribed payment of taxes as an elector qualification. Some did both. Maine disqualified paupers. Me. Const., Art. II, § 1 (1819). New Hampshire disqualified "paupers and persons excused from paying taxes at their own request." N.H. Const., Part Second, Art. XXVIII (1792). Vermont provided that only a person "whose list shall have been taken" or who should be "exempt

from taxation in consequence of having arrived at the age of sixty years" could vote in town elections. Vt. Gen. Stat., Ch. 15, §1 (1863). This provision resulted in both a requirement of payment of a poll tax of two dollars and in possible exclusion of paupers from voting, since poll taxes in that amount were included upon the list taken annually and since the listers were empowered to "omit the polls of such persons as are extremely poor" from the list. Vt. Gen. Stat., Ch. 83, § 1 (1863).

Massachusetts both disqualified paupers and required payment of "any state or county tax, which shall, within two years next preceding such election, have been assessed . . . in any town or district of this Commonwealth." Mass. Const. (1780), amend. III (1821). This constitutional provision in effect required payment of a poll tax of not more than $1.50, see Mass. Gen. Stat., Ch. 11, §§ 1, 6, 31 (1860); in fact, the state poll tax was enacted to enable persons to vote, since otherwise the legislature or the localities could disfranchise the populace by failing to assess normal taxes. See Mass. Acts and Resolves 1891, pp. 1113-4 (address of Gov. William E. Russell, urging repeal of the tax payment qualification).*

Rhode Island required either a freehold of the value of $134, payment of town or city taxes of at least one dollar, or service in a state military company. R. I. Const., Art. II, §§ 1-2 (1843). The Constitution required the assessors of each town and city to assess every registered voter with an annual "registry tax" of one dollar "or such sum as with his other taxes shall amount to one dollar." The "registry tax," like the Virginia poll tax, was applied to support of the pub-

* Governor Russell also observed in his address that the tax payment qualification subjected Massachusetts to the second section of the Fourteenth Amendment (*Id.*, 1114). The qualification was repealed in Massachusetts in 1891 by the adoption of Amendment XXXII to the Massachusetts Constitution.

lice schools and was not collectible by compulsory legal process. R. I. Const., Art. II, § 3 (1843).

New York did not disqualify paupers or require tax payment of whites, but in order to be able to vote, a "man of color" had to own a freehold worth $250 upon which a tax was actually paid by him. N. Y. Const., Art. II, § 1 (1846). New Jersey disqualified paupers. N. J. Const., Art. II, § 1 (1844). Pennsylvania required payment of a state or county tax of all voters except men between the ages of 21 and 22. Pa. Const., Art. III, § 1 (1790). West Virginia disqualified paupers. W. Va. Const., Art. III, § 1 (1863).

Nevada's Constitution directed the legislature to enact a poll tax of four dollars and provided that payment of the tax could be made a condition of voting. Nev. Const., Art. II, § 7 (1864). In its first session, the legislature enacted a voter registration law and made poll tax payment a condition of registration. Nev. Stat. 1864-65, Ch. CXXIV, § 16, p. 386. This act was repealed, and another registration law, likewise requiring poll tax payment, substituted therefor, by Nev. Stat. 1866, Ch. XXXVIII, § 16, p. 88. A similar law, repealing the former statute and substituting a law likewise requiring poll tax payment, was enacted in 1869. Nev. Stat. 1869, Ch. XC, § 13, p. 145. Poll tax payment was finally abolished as a condition of registration in 1871. Nev. Stat. 1871, Ch. LXIV, p. 132.

The Fourteenth Amendment was approved by Congress in 1866 and speedily ratified by the overwhelming majority of the Union States in the following twelve months. During this time only one of the Confederate States (Tennessee) ratified the Amendment and it was another year before the necessary ratifications were assembled from the others. It is unrealistic, accordingly, to suppose that the Fourteenth Amendment was a spontaneous movement on the part of the Union States to reform themselves. Quite plainly it was an

effort on their part to reform others. It is, in short, inconceivable that the Amendment would have been promptly adopted by a majority of the Union States had they imagined that by doing so they would automatically invalidate their own cherished and age-old suffrage requirements. They naturally understood the contrary, since they were so assured by the Framers of the Amendment itself.*

Turning now to the former Confederate States, the Court has further contemporaneous evidence in the action of Congress upon their readmission to the Union. The Reconstruction Act of March 2, 1867, 14 Stat. 428, required North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida to draw up new constitutions for approval by Congress and to ratify the Fourteenth Amendment as the price of readmission. The South Carolina Constitution of 1868, Art. VIII, §2 disqualified persons kept in alms houses, and the Georgia Constitution of 1868, Art. II, §2, required payment of "all Taxes" as a condition of voting. "All Taxes" included poll taxes of one dollar, levied annually on all males between 21 and 60 by acts of the legislature. Ga. Acts 1868, No. 117, § 11(9), p. 153; Ga. Acts 1869, No. 148, § 2(9), p. 160. South Carolina was readmitted upon the condition that it ratify the Fourteenth Amendment by Act of June 22, 1868, 15 Stat. 72; Georgia was readmitted by the same Act upon the same condition and upon the further condition that some obscure provisions of its new constitution be deleted.** Georgia was unconditionally readmitted by Act of July 15, 1870, 16 Stat. 363.

* For the prevalence of property and tax payment qualifications when the Constitution itself was adopted, see F. N. Thorpe, "Constitutional History of the American People, 1776-1850" (1898), Vol. I, pp. 93-96, and E. McC. Sait, "American Parties and Elections," (3d ed. 1942), pp. 24-25.

** Debate in Congress over this provision, which was believed to violate the Impairment of Contracts Clause, was extensive. See Congressional Globe, 40th Cong., 2d Sess. 2968-70, 2998-3008 (1868).

Again, it is inconceivable that the Congress which was acutely concerned over questions of suffrage, which conditioned readmission of the Southern States upon their ratification of the Fourteenth Amendment and adoption of new constitutions written conformably therewith, and which examined those new constitutions with such care as to perceive a minor flaw in the Georgia Constitution, would have allowed South Carolina and Georgia to rejoin the United States had it believed that the first section of the Amendment made unconstitutional South Carolina's disqualification of paupers or Georgia's requirement that voters pay their taxes, including poll taxes. It is likewise incredible that South Carolina and Georgia would have so written their new constitutions, if they had understood them to be in conflict with the Amendment. No such conflict, but rather clear conformity, was found by Congress. As Representative Bingham declared, during debate over readmission:

> "The constitutions of these several [Southern] States, in accordance with the spirit and letter of the Constitution of the United States as it stands amended by the act of the American people, secure equal political and civil rights and equal privileges to all citizens of the United States, native born and naturalized." Congressional Globe, 40th Cong., 2d Sess. 2462 (1868).

These events show that neither the Union States nor the former Confederate States thought Section 1 of the Fourteenth Amendment prevented them from conditioning suffrage as they might see fit, specifically by a requirement for payment of poll and other taxes and a disqualification of paupers. It is equally manifest that Congress was in complete accord.

With these events freshly in mind, the Court was of the unanimous view that this general understanding was correct

and Section 1 of the Fourteenth Amendment had no application to any question of suffrage. *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162, 175 (1875, discussed more fully below.)

(e) Corroboration by Amendments

Adoption of the Fourteenth Amendment within a two-year period and an intervening election that strengthened the Congressional forces for reform led to a further step, not thought feasible before but judged so now. In 1869 the Fifteenth Amendment was proposed:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

The only reason for the Fifteenth Amendment was to reverse, in this respect, the Fourteenth Amendment so as to prohibit, rather than to permit, voter restrictions on specified grounds. By so doing it also made inoperative, to this extent, the deterrent provision in Section 2 of the Fourteenth Amendment, since the prohibition made the penalty needless. The adoption of the Fifteenth Amendment, we submit, was a constitutional reiteration that the Fourteenth Amendment contained no restriction on suffrage qualifications in any respect.

Leaving the troubled days of the Civil War and turning to modern times, it is noteworthy that every attempt to apply Federal power to the determination of the qualifications of voters, a subject otherwise consistently left to the sovereign powers of the several States, has been by specific constitutional amendment. Of these, there have been two.

The Nineteenth Amendment, adopted in 1920, provides:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

Sex has been with us throughout history and women are undeniably citizens. Had the Fourteenth Amendment conferred any guarantee of voter qualification, the Nineteenth Amendment would have been wholly needless. The adoption of the Amendment is corroboration by Congress and the States that the Fourteenth Amendment had no such effect.

Even stronger is the Twenty-Fourth Amendment, adopted in 1964, and the words, dealing with the precise subject of poll taxes, merit special attention:

> "The right of citizens of the United States to vote in any primary or other election for the President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

These words were chosen with care because it was not thought that a broader amendment would be accepted and many of the sponsors were themselves opposed to such intrusion into affairs of the States. Thus the Report of the House Committee on the Judiciary emphasized that the Amendment

> "... would not prevent a State from imposing a poll tax in purely State or local elections." H.R. Rep. No. 1821, 87th Cong., 2d Sess. 5 (1962).

To the same effect the minority report explained that:

> "[T]he joint resolution owes much of its support to the fact that it does not affect State elections but only Federal elections ..." (*Id.*, 9).

In the hearings on this same proposal at the previous session, Senator Holland, one of the co-sponsors, explained to the Senate Committee on the Judiciary that:

> "... it prohibits poll taxes only with reference to the right to vote for the specific offices of electors for President or Vice-President, Senators, and Representatives in Congress. It does not prevent the imposition of a poll tax as a prerequisite for voting for State or local officials or upon State or local issues. I emphasize this point ... because many of us who are cosponsors of this joint resolution strongly feel that the election of State and local officials ... are properly and more effectively handled on the State and local level, and we would strenuously oppose any effort to control such matters by Federal law." Hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 87th Cong., 1st Sess. 86 (1961).

Clearly this proscribes poll tax requirements in the enumerated Federal elections. Clearly it confirms the power of the States to require poll taxes in State and local elections. To prohibit work on Sunday is to permit work on Monday. That is the very meaning of a line in the law. And if a "bright line" is desired *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205, 215 (1964), no clearer one could be found. There is no question here of "repeal" (Gov. 26) of the Fourteenth Amendment by implication or otherwise. It is a straightforward matter of repeated Amendments of similar tenor establishing a canon of constitutional construction that corroborates the plain meaning of the Fourteenth Amendment proclaimed alike by its words and its history. We do not here deal with the manipulation or dilution through whatever device of ballots cast by qualified voters (discussed at p. 35 below). Here we deal only with the determination of the qualifications for voting in State and local elections. We submit that this is a subject

left by the original Constitution and all of its Amendments to the exclusive and final choice of the respective States. If a change in that respect be desired, the procedure of amendment is indicated. This was clearly the view of Congress in proposing the Twenty-Fourth Amendment:

> "Since Congress is not given the power by the Constitution to regulate either voting qualifications or the manner of election of presidential electors, their inclusion in the amendment requires the constitutional amendment approach." H.R. Rep. No. 1821, 87th Cong., 2d Sess. 5 (1962).

(*f*) *Judicial Decisions*

These principles were approved as fundamental by the unanimous Court in *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162 (1875). This was an attack by a female citizen of Missouri on the State constitutional provision restricting the suffrage to "every male citizen," asserting that this provision was overridden by the Constitution and particularly the Fourteenth Amendment. In rejecting this contention, the Court said:

> ". . . the Constitution has not added the right of suffrage to the privileges and immunities of citizenship . . ." (171)
>
> * * *
>
> "When the Federal Constitution was adopted . . . in no State were all citizens permitted to vote. Each State determined for itself who should have that power." (172)
>
> * * *
>
> "Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage." (177)

The precise operation of the Fifteenth Amendment was made clear the next year in *United States* v. *Reese,* 92 U.S. 214 (1876):

> "The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. *Before its adoption, this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, &c., as it was on account of age, property, or education. Now it is not.*" (217-18, emphasis added)

Similarly in *Pope* v. *Williams,* 193 U.S. 621 (1904) the Court unanimously sustained a requirement of Maryland that persons moving into that State had to register one year before they might be permitted to vote, repeating that:

> "The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments." (632)

and emphasizing that:

> "The question whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one." (633)
>
> * * *
>
> "The reasons which may have impelled the state legislature to enact the statute in question were matters entirely for its consideration, and this court has no concern with them." (634)

The only instance of possibly reviewable discrimination alluded to by the Court was the capricious and fanciful discrimination of permitting a citizen coming from New York

to vote, but denying the privilege to one coming from Georgia (634).

The crucial importance of this distribution of authority for the survival of our Federalist system was stressed in *Guinn* v. *United States,* 238 U.S. 347 (1915):

> *"Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning* and without the possession of which power *the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support* and both the authority of the nation and the State would *fall to the ground."* (362, emphasis added)
>
> * * *
>
> *". . . it is true also that the Amendment does not change, modify or deprive the States of their full power as to suffrage except of course as to the subject with which the Amendment deals . . ."* (*Ibid.,* emphasis added)

The specific subject of the poll tax came to the Court in *Breedlove* v. *Suttles,* 302 U.S. 277 (1937). This was a suit by a Georgia citizen to compel local officials to allow him to vote in a Federal election without the payment of the $1 poll tax required by the Georgia statute, asserting that it was overridden by the Fourteenth and Nineteenth Amendments. This attack was likewise denied by the unanimous Court, saying:

> "Levy by the poll has long been a familiar form of taxation, much used in some countries and to a considerable extent here, at first in the Colonies and later in the States." (281)
>
> * * *
>
> "To make payment of poll taxes a prerequisite of voting is not to deny any privilege or immunity protected

> by the Fourteenth Amendment. Privilege of voting is not derived from the United States but is conferred by the State and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the State may condition suffrage as it deems appropriate." (283, citing *Minor* v. *Happersett, supra,* and many other cases)
>
> * * *
>
> "The payment of poll taxes as a prerequisite to voting is a familiar and reasonable regulation long enforced in many States and for more than a century in Georgia." (283-4)

This has been uniformly followed since. *Butler* v. *Thompson,* 97 F. Supp. 17 (E.D. Va.), *aff'd per curiam,* 341 U.S. 937 (1951); *Saunders* v. *Wilkins,* 152 F. 2d 235 (4th Cir. 1945), *cert. den.,* 328 U.S. 870 (1946); *Pirtle* v. *Brown,* 118 F. 2d 218 (6th Cir.), *cert. den.,* 314 U.S. 621 (1941). It is of interest that the finding in *Butler* of non-discriminatory application of the Virginia poll tax requirements (97 F. Supp. at 23-24) was based on a broad survey of the practice of local officials throughout Virginia, introduced in evidence by stipulation.

It is strange to see the Government assert (Br. 15) that the "only question actually discussed" in *Breedlove* was whether the Fourteenth or Nineteenth Amendments forbade a State to exempt women from the poll tax. It is quite clear from the above quotations that the Court discussed and sustained the substantive authority of the States to impose a poll tax as a prerequisite to the privilege of voting. That this was no excursion beyond the issues presented is plain from the Reporter's summary of appellant's argument, which sounds like a summary of the views urged here by the Government and Appellants:

> "The appellant contends that the privilege of voting for federal officials is one to which he is entitled, un-

> restricted by a tax unreasonably imposed through state invasion of his rights as a citizen of the United States. As such citizen he is entitled to participate in the choice of electors of the President and the Vice President of the United States and of Senators and Representatives in Congress and no State may exercise its taxing power so as to destroy this privilege. If the tax imposed by Georgia were increased to a high degree, as it can be if valid, it could be used to reduce the percentage of voters in the population to even less than eight per cent. as at present, or to destroy the elective franchise altogether. Whatever property and other economic restrictions on the franchise may have been upheld in earlier periods of our history, the admission today that a State has the power to prevent its poorer inhabitants from participating in the choice of federal officials would be totally contrary to the contemporary spirit of American institutions, and inconsistent with the purposes announced in the Preamble to the United States Constitution." (302 U.S. at 279)

Breedlove is, therefore, indistinguishable and dispositive.*

The reapportionment cases, which have stimulated varying expressions from the Court, are not relevant here. *Baker* v. *Carr*, 369 U.S. 186 (1962); *Gray* v. *Sanders*, 372 U.S. 368 (1963); *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Reynolds* v. *Sims*, 377 U.S. 533 (1964). All of those cases, as the Government admits (Br. 23), dealt with "the right to vote of persons qualified under State law to vote." The holding was that if a person is qualified to vote and does so, his vote must be fairly counted, and not thrown away or diluted so as to have no proper effect. None of those cases touches on the question of the power of the States to deter-

* It should be particularly controlling in all State elections because in Federal elections the interest of the Federal Government is naturally more intimate. *United States* v. *Classic*, 313 U.S. 299 (1941); *Ex parte Yarbrough*, 110 U.S. 651 (1884). The Twenty-fourth Amendment is sufficient evidence of this special solicitude.

mine qualifications for voting. It is insufficient for the Government to urge (Br. 23) that the "practical effect" of disqualification and dilution is the same. It might just as well be urged that the Twenty-Fourth Amendment, in occupying the field with regard to qualifications in Federal elections, should be read as occupying the field in qualifications for State elections also since the "practical effect" of being disqualified in State elections may be the same as disqualification in Federal elections.

Of much graver nature than these analogies, urged here for the first time, is the long record of history reviewed by Mr. Justice Harlan in the reapportionment cases, especially *Reynolds* v. *Sims,* 377 U.S. 533, 589-632 (1964). Since that history deals in terms with voter qualifications, a subject left to the authority of the States, it is precisely in point on the present issue, even though less so in the reapportionment cases that dealt only with the fair recognition of ballots cast by admittedly qualified voters. While it may be arguable whether the Framers intended the Fourteenth Amendment to govern the weighting of votes after they have been cast, it is certainly clear that they did *not* intend to restrict the power of the States to determine suffrage qualifications, which had been their unquestioned prerogative since before the original Constitution was adopted.

The suffrage cases principally relied on by the Government and Appellants raise no question as to the validity of the Virginia poll tax here in issue.

Carrington v. *Rash,* 380 U.S. 89 (1965) was an instance of invidious discrimination between persons satisfying all the general requirements of residence, some of whom were permitted to qualify as voters, while others were absolutely prevented from doing so. In that case a sergeant in the United States Army, originally from Alabama but on duty in New Mexico, bought a house, made a family and established a business in Texas, with the admitted intention of

residing there permanently. "But for his uniform," Texas conceded his eligibility to vote (91). Indeed he was a resident for divorce actions and other purposes. But,

> "Texas has said that no serviceman may ever acquire a voting residence in the State so long as he remains in service." (91-92)

The Court held this contrary to the Equal Protection Clause as a permanent prohibition against all servicemen as a class, though otherwise complying with all residence requirements. The case, in short, did not establish any qualification requirements with which prospective voters could comply by reasonable effort, but imposed a permanent disqualification on servicemen whatever their circumstances or efforts might be. This is in contrast to a system of qualification requirements open to satisfaction by all the world on reasonable effort as in the case of the Virginia poll tax here in issue.

United States v. *Louisiana,* 380 U.S. 145 (1965), like the previous *per curiam* decision in *Schnell* v. *Davis,* 336 U.S. 933 (1949), affirming 81 F. Supp. 872 (S.D. Ala.), invalidated qualification procedures requiring that the applicant "understand and explain" any article of the Constitution to the satisfaction of local registrars. In both cases the District Courts found that (*i*) the provisions contained no objective standard to guide the registrars, who thus had virtually uncontrolled discretion over registration for voting, (*ii*) the registrars had exercised their broad power systematically to refuse the registration of otherwise qualified Negroes, and (*iii*) the provisions had been intended to deter and actually continued to deter Negroes from voting. On the basis of those findings, both District Courts held the provisions to violate the Fourteenth and Fifteenth Amendments. Both decisions were affirmed. The decision of this Court in *Louisiana* seems principally to have been based on the Fifteenth Amendment and Mr. Justice Harlan concurred

only on that basis (380 U.S. at 156). But once the Fifteenth Amendment prohibited voter discrimination on the ground of race and thus made such immunity a Federal right, it is not difficult to say that the Fourteenth Amendment grew concurrently and thereafter prohibited the denial of equal protection to this new right. The Constitution is to be read as a whole like other documents. By applying the same reasoning to the poll tax issue, the Fourteenth Amendment might correspondingly be deemed to prevent imposition of a poll tax in Federal elections, as now proscribed by the Twenty-Fourth Amendment, but certainly not in State elections, which the Twenty-Fourth Amendment leaves untouched.

Harman v. *Forssenius,* 380 U.S. 528 (1965) merely held that Virginia may not constitutionally compel a Federal voter *either* to pay the poll tax proscribed by the Twenty-Fourth Amendment *or* to file a certificate of residence executed before a witness or notary public, on the ground that this is a substantial burden imposed on those who do not waive their constitutional privilege under the Twenty-Fourth Amendment. As purely a Twenty-Fourth Amendment case, it has no bearing on State election procedure, which alone is involved here.

3.

THE POLL TAX DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

To the above discussion we add only two further elements, first the historical customs that prevailed when the Fourteenth Amendment was adopted, and second, the distinctive function of the Virginia poll tax as an elementary and objective intelligence test.

When the Fourteenth Amendment was adopted, 5 States had tax requirements in effect, mostly in the form of poll

tax requirements* and upon readmission to the Union after screening by Congress to verify compliance with the Fourteenth Amendment the Georgia Constitution contained the same requirement.** As the unanimous Court said in *Breedlove* v. *Suttles,* 302 U.S. 277 (1937):

> "The payment of poll taxes as a prerequisite to voting is a familiar and reasonable regulation long enforced in many States . . ." (283)

We submit that, howsoever much judgment may be at large in appraising any novel restriction on voting that has no precedent in history, it is not desirable or indeed permissible for the Justices, in fulfillment of their oath and office, to reject the teaching of history and utilize the Equal Protection Clause to invalidate what was in general use before, at and after the adoption of the Fourteenth Amendment. It is impermissible, we submit, for the Government (Br. 32-33) to call on this Court for a declaration that particular forms of suffrage requirement long in common usage "can no longer be justified" because they have become antiquated or out of date. Were this Court to sit as an arbiter of fashion and enforce its views of modernity from time to time uniformly throughout the country under the Equal Protection Clause, it would effectually destroy the Federalist system which has given flexibility of judgment in differing areas having different conditions and thus safeguarded the operation and continuance of the Republic.

But if, finally, it were, contrary to our belief, permissible

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*Mass. Const. (1780), Amend. III (1821), Mass. Gen. Stat., Ch. 11, §§ 1, 6, 31 (1860); N. Y. Const., Art. II, § 1 (1846); Nev. Const., Art. II, § 7 (1864); Pa. Const., Art. III, § 1 (1790); R. I. Const., Art. II, §§ 1-3 (1843); Vt. Gen. Stat., Ch. 15, § 1 (1863).

**Ga. Const., Art. II, § 2 (1868), requiring payment of "all Taxes," which included poll taxes. Ga. Acts 1868, No. 117, § II(9), p. 153, Ga. Acts 1869, No. 148, § 2(9) p. 160.

for the Court to discard the precedents of history and freely reappraise particular statutes on request, then we submit that, even in this novel exercise of jurisprudence, the Virginia poll tax here in issue as applied to State elections should be sustained for the following reasons:

1. A tax of fixed amount has been imposed or authorized on every citizen almost continuously throughout the history of the Commonwealth: Acts of Assembly 1775, Ch. 5, p. 65; Acts of Assembly 1776, Ch. XIV, p. 144; Acts of Assembly 1781, Ch. XXXII, Arts. I and II, p. 490, and Ch. XL, Art. II, p. 504; Acts of Assembly 1787, Ch. 1, Art. XXV, p. 431; Constitution of 1851, Art. IV, §24; Constitution of 1864, Art. IV, §22; Constitution of 1867, Art. X, §5; Constitution of 1902, §173.

2. While admittedly some of the most vocal members of the Constitutional Convention of 1902 expressed a desire to disfranchise the Negro by the poll tax provision, *Harman* v. *Forssenius*, 380 U.S. 528, 543 (1965), this is by no means a realistic summary of the prevailing views of the Convention:

> "Even the most violent . . . also expressed an intention to bring about this result by means that were valid under the Federal Constitution. . . . And the expressions of these few can hardly be taken as necessarily voicing the dominant spirit of the Convention. For other voices were raised in the Convention to advance ideas couched in quite a different key." *Butler* v. *Thompson*, 97 F. Sup. 17, 21 (E.D. Va.), *aff'd per curiam*, 341 U.S. 937 (1951).

Actually the tone of the Convention was set by the opening address of its president, John Goode. President Goode acknowledged that one of the main purposes of the Convention was to reverse the provisions for universal suffrage

found in the Underwood Constitution that had been imposed upon Virginia as a condition to readmission to the Union. But, he emphasized, Virginia must so regulate suffrage as not to violate the Constitution of the United States, particularly the Fifteenth Amendment. He then referred to the new constitutions recently adopted by Mississippi, South Carolina, North Carolina and Louisiana, and pointed out that the poll tax and intelligence tests provided in the Mississippi Constitution had been held constitutional by the unanimous Court in *Williams* v. *Mississippi*, 170 U.S. 213 (1898). Finally, President Goode pleaded for a plan of suffrage that would eliminate the fraud, bribery and corruption that had characterized Virginia elections since the adoption of the Underwood Constitution. *Proceedings and Debates of the Virginia Constitutional Convention* (1901-1902), 20-21.

3. Apart from all of this and even on the assumption, which we think untenable,* that the controlling motive of

*The records of the Constitutional Convention of 1902 clearly show an intent to disfranchise illiterate and ignorant whites as well as Negroes. Mr. McIlwaine, delegate from Prince Edward, declared:

> "The need is universal, not only in the country, but in the cities and towns; not only among the blacks, but among the whites, in order to deliver the State from the burden of illiteracy and poverty and crime, which rests on it as a deadening pall. . . ." (*Proceedings and Debates*, 2998)

Many delegates believed that the poll tax would have special effects on the white vote. Mr. Flood, an opponent of the poll tax, declared:

> "I have always maintained and believed that more white people will be stricken from our registration rolls than negroes by such a provision." (*Id.*, 2864).

A supporter, Mr. Gordon, exclaimed:

> "I am in favor, Mr. Chairman, of the capitation tax, and I do not hesitate to say so, because I believe it will disqualify some white men in Virginia who ought to be disqualified. . . . I want to say to the gentlemen of this body that when they undertake to put an additional capitation tax on the people of Virginia and

the Convention was to disfranchise the Negro through the operation of the poll tax, the issue here does not require this Court to condemn or sustain the motives of individuals who have died long ago, but rather to appraise the operation and effect of the poll tax as a governmental measure in the manner actually operating today.

4. It is the policy of Virginia to enforce the poll tax requirement in an even-handed, undiscriminating manner, making "every practical and reasonable effort to assess the capitation tax against and to collect it from all persons assessable therewith under the laws of Virginia, without favor or discrimination toward any, . . . objectively, impartially and totally without regard to race, national origin, economic position, faith or political persuasion" (App. A, p. 3). The payment, moreover, is a periodic affirmation of continuing residence, since otherwise there would be no motive for its payment (App. p. 6).

5. The sum of $1.50 a year, equivalent to about 50 cents in terms of 1902 dollars, is manifestly so trivial that any

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then provide that it shall be a prerequisite to voting, instead of disfranchising the African, they are disfranchising the Anglo-Saxon." (*Id.*, 2871-2).

Another delegate, Mr. Thom from Norfolk, reported that many members of the Suffrage and Elections Committee looked with apprehension upon the poll tax requirement and felt it was impossible to forecast its result. He said:

> ". . . The report comes to us from large, and from diversified, sections of this State that in many of these communities it will be an exceedingly problematic matter as to whether the poll tax will not strike harder upon the white race six months in advance than it will upon the negro." (*Id.*, 2979).

He cited the decrease that had occurred in the white vote in Mississippi and said this decline may have been brought about at least partly by the poll tax. Another member advised that he had always been against the tax as a suffrage prerequisite because he believed that it would disfranchise, at least in the mountain section and in the cities, as many or more whites as Negroes. (*Id.*, 2970-80, 3010).

claim of discrimination through such a requirement should be dismissed as frivolous. It has, in any event, no particular bearing on the Negro race, since in fact of all persons in Virginia with annual incomes less than $3,000 in 1960, the whites numbered 827,398, while the non-whites numbered only 298,189 (1960 Census of Population, Table 67 for Virginia). So if there is any economic barrier in such a slight sum, it affects nearly three times as many whites as non-whites and is thus, wholly without racial meaning.

6. The tax does not require any astronomical predetermination of election dates, as the Government would imply, but only requires an annual payment of $1.50 by December 4 in every year and this serves as "a simple and objective test of certain minimal capacity for ordering one's own affairs and thus of qualification to participate in the ordering of the affairs of state" (App. A, p. 6). While an intelligence test as such is subject to abuses through administration, "the capitation tax is as mechanical as the calendar" (App. A, p. 7). Bills are in fact sent to all known or knowable persons and, if not, any one is entitled to register and pay on request so that, in short, the poll tax is "the simplest, most equal, non-discriminatory and objective test of minimum intelligence and responsibility that could be devised" (App. A, p. 7). This was specifically anticipated in the Convention:

> "Then we have an educational qualification. The voter has to pay a poll tax, prepare his own application and cast his own ballot. The plan virtually eliminates the incompetent from politics." (*Proceedings and Debates*, 2996.)

7. Finally, as emphasized by Judge Morrissett, the State Tax Commissioner of Virginia for the last 39 years, George Mason, principal author of the first ten Amendments and

also author of the Virginia Declaration of Rights, wrote in Section 6 of the present Constitution of Virginia that all men "having sufficient evidence of permanent common interest with, and attachment to, the community" should have the right to vote and Judge Morrissett "can think of no better way for the citizen and prospective voter, whatever the particularities of his position, to demonstrate his common interest with and attachment to his State and his community than to respect the common requirement for due and timely payment of the trifling and token sum expected of all citizens to qualify themselves for suffrage." (App. A, pp. 7-8).

In accord with 4 above, the Civil Rights Commission has reported twice on the Virginia poll tax. In 1959 it said:

> "... the poll tax is not as serious a restriction as it once was, for it is difficult to administer so as to bar Negroes alone from the ballot box. Any administrative procedure by which the tax would be exacted from the Negro alone would most certainly be invalidated by the Federal courts." (1959 Report, p. 118)

In 1961 it added that various sources of evidence

> "... have led the Commission to conclude that, with the possible exception of a deterrent effect of the poll tax—which does not appear generally to be discriminatory upon the basis of race or color—Negroes now appear to encounter no significant racially motivated impediments to voting in 4 of the 12 Southern States: Arkansas, Oklahoma, Texas, and Virginia." (1961) Report, p. 22).

To the same effect is Ogden, "The Poll Tax in the South" (1958) p. 75. Much is made by the Government of comparative voting statistics (Br. App. B) ostensibly indicating that

repeal of a poll tax tends to increase the number of voters. But this is a superficial inference. The elaborate study of Ogden led to these conclusions:

> "What conclusions about the effect of the poll tax upon voting result from this examination of voting both before and after adoption and repeal? An obvious one is that no single factor affects voting but that turnout is influenced by many interrelated causes. Because of this fact, it is extremely difficult to isolate any one factor and assign a definite weight to it. The investigation also showed that voting tended to decline before adoption and to increase prior to repeal. Thus, in both instances, the action taken with respect to the tax seemed to aid a movement already underway. The tax did not initiate the trend. Poll tax adoption did not cause a permanent decrease in voting; similarly, tax repeal did not produce a steady increase in participation." (*Op. cit.* 137)*

It is axiomatic that a non-discriminatory intelligence test is both frequent and valid. *Lassiter* v. *Northampton County Election Bd.*, 360 U.S. 45 (1959), cited with approval in *Carrington* v. *Rash, supra,* at 91. We learn from *Lassiter* that:

> "Literacy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show" (51).

* The Government in Appendix B to its Brief emphasizes the proportional increase in voting at the 1964 presidential election in Southern States having a poll tax. It fails to mention, however, that there was a similar increase in Southern States which had long ago repealed the poll tax (Georgia, + 14%; South Carolina, + 8%; Florida, + 2%; and Louisiana, + 4%). (Br. App. B 47-48). This indicates most strongly that there were major factors other than the effect of the Twenty-fourth Amendment that caused a general proportional increase in voting throughout the South, one of which may have been that the Republican presidential candidate appealed strongly to some Southern white voters and correspondingly alarmed most Southern Negro voters.

While literacy was not thought synonymous with intelligence and the latter was the touchstone of validity, the Court held unanimously that a State was at liberty to equate one with the other, validating a literacy test on that ground and thus reaffirming the intelligence test:

> "We do not sit in judgment on the wisdom of that policy. We cannot say . . . that it is not an allowable one measured by constitutional standards" (53).

Virginia's poll tax system requires only the minimal intelligence necessary to make the periodic payment of a token sum of $1.50 by December 4th of each year. As her State Tax Commissioner said, this is not the type of intelligence test that is susceptible of administrative abuse, but on the contrary it is "as mechanical as the calendar" (App A., p. 7) and, in short, is "the simplest, most equal, non-discriminatory and objective test of minimum intelligence and responsibility that could be devised". (App. A, p. 7).*

4.

THE QUESTION OF PAUPERS IS NOT PRESENTED.

The court below held that the question of the constitu-

* We trust that the Court will give no weight to declarations by Congress in Section 10(a) of the Voting Rights Act of 1965, 79 Stat. 442. Whatever weight such declarations may be accorded when the substantive legislation dealing with the subjects they relate to is under attack, see *Block* v. *Hirsh*, 256 U.S. 135, 154 (1921); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 (1938), it is clear that when (as here) they are offered as proof of matters in issue, they are entitled to no probative significance. See *United States* v. *Silverman*, 132 F. Supp. 820, 830-31 (D. Conn. 1955); *United States* v. *Blumberg*, 136 F. Supp. 269, 274 (E. D. Pa. 1955). In the latter context, in fact, they are nothing more than a bill of attainder—an attempted "substitution of a legislative for a judicial determination of guilt." *DeVeau* v. *Braisted*, 363 U.S. 144, 160 (1960) (concurring opinion). The matter is controlled by Constitutional principle rather than by opinions in Congress.

tionality of Virginia's disqualification of paupers, Va. Const. §23, Va. Code §24-18, was academic, inasmuch as there was no showing that it had ever been enforced to disfranchise anyone. The court's judgment was eminently correct. In *Poe* v. *Ullman,* 367 U.S. 497 (1961), plaintiffs sued to have the Connecticut anticontraceptive law, eventually found invalid in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), declared unconstitutional. By demurrer, the defendant, the State's Attorney, admitted their allegations that he intended to prosecute them for violating the law, in the course of his duty to prosecute all offenders against Connecticut law. The Court, however, viewing the longstanding failure of Connecticut authorities to enforce the law as an "undeviating policy of nullification" 367 U.S. at 502, held that the constitutional question was not properly presented. It declared:

> "If the prosecutor expressly agrees not to prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case as will be reviewed here. *C.I.O.* v. *McAdory,* 325 U.S. 472, 475. Eighty years of Connecticut history demonstrate a similar, albeit tacit agreement. The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication. This Court cannot be umpire to debates concerning harmless, empty shadows. To find it necessary to pass on these statutes now, in order to protect appellants from the hazards of prosecution, would be to close our eyes to reality." (507)

These observations are apposite here. The present disqualification for pauperism has been on the books in Virginia for sixty-three years, since adoption of the Constitution of 1902. A similar disqualification existed under the Constitution of 1830, Article III, Section 14, and under the

Constitution of 1851, Article III, Section 1, until adoption of the Constitution of 1869. But we have been unable to find one recorded instance of enforcement of the disqualification to bar a voter from the polls, during any of the periods of its existence. The disqualification, by virtue of the State's "undeviating policy of nullification" has become a dead letter.

Moreover, there is not present in this case even a threat that the disqualification will be resurrected and enforced against the Appellants. If the statements of counsel in argument, made "under provocation of litigation," *Poe* v. *Ullman, supra,* at 509 (concurring opinion), are satisfactory evidence, those of the Assistant Attorney General here prove only that he believes the disqualification to be "valid, constitutional and enforceable" (R. 25), and that it applies to Appellants. (R. 27-30). This statement of belief, we think, considering the circumstances in which it was made, does not constitute a real or immediate threat of enforcement. In addition, it may be noted that the Assistant Attorney General, unlike the representative of Connecticut, is not *ex officio* charged with enforcing the elector qualification laws; that duty devolves solely upon election judges. Va. Code §24-253. Finally, owing to the utter lack of controlling authority, stemming in turn from the fact that the laws in issue have never been enforced, it would be necessary to refer the question who are paupers to a Virginia court for resolution before the Court could determine that the Appellants are proper parties to challenge the constitutionality of the pauper disqualification. Compare *American Federation of Labor* v. *Watson,* 327 U.S. 582, 597-98 (1946).

In sum, the court below acted quite properly in refusing to entertain the Appellants' complaint against the pauper disqualification, and its judgment should be affirmed.

CONCLUSION

The central thesis of the Government's Brief (14) is that "*any* tax levied on voting, and carrying the sanction of disfranchise for non-payment" is unconstitutional, regardless of any reduction in amount or simplification of procedure, invalid, that is, without regard to detail but intrinsically and absolutely. This concept, pressed now on the Court for the first time in history, is of revolutionary nature, since it strikes at the heart of the very principle of Federalism which succeeded in creating the Union and maintaining it as the marvel of the modern age. The underlying question is not the individual preferences of the Justices for or against a poll tax of any particular kind as such, or indeed the adoption or rejection of any particular voter qualification, but whether this Court shall undertake by its own word to overturn basic constitutional principle on the distribution of power between the Federal government and the States that has been considered beyond challenge throughout the ages. Undoubtedly the Government urges what it conceives to promote a more just and orderly society. But the Federal Government was not constituted to make these judgments for every issue, howsoever domestic, in every quarter of the land, howsoever remote from the Federal City. The zeal for reform, in seeking immediate satisfaction of particular objectives, should not be allowed to endanger those distributions of authority that, duly respected, have sustained our republic to the present, but abandoned may well presage

its disappearance among the empires of the past whose names are now but history.

The judgment of the court below should be affirmed.

Respectfully submitted,

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October 9, 1965

APPENDIX A

DEPOSITION OF C. H. MORRISSETT
September 27, 1965

C. H. MORRISSETT, after being first duly sworn, deposed and said as follows:

DIRECT EXAMINATION

BY MR. HARRIS:

Q Mr. Morrissett, for the record, state your full name.

A Carlisle Havelock Morrissett.

Q And your position with the State of Virginia?

A State Tax Commissioner.

Q How long have you held that position?

A Since April 1926.

Q And prior to that time would you tell us what position you held with the State?

A From 1919 to 1926 I was the Director of the Legislative Reference Bureau; from 1914 to 1919 I was employed by the Code Commission of 1914 to assist in the revision of the general laws of Virginia.

Q Would you state the general nature of your duties as Director of the Legislative Reference Bureau?

A As Director of the Legislative Reference Bureau it was my duty to draft bills for the members of the General Assembly and for the Governor, all done at the request of the members or the Governor. It was also my duty to give legal information to the members of the General Assembly relating to legislation.

Q I assume you hold a Law Degree?

A I am a graduate of the Law School of Washington and Lee University, Class of 1914.

Q Would you tell us the general scope of your duties as Tax Commissioner?

A As State Tax Commissioner, I am the chief executive officer of the State Department of Taxation; my duties are prescribed by the statutes of Virginia. Some categories of state taxes are assessed and collected directly by my office. In other cases, I have general supervision over local Commissioners of Revenue, insofar as their duties with respect to State taxes are concerned.

Q Are you familiar with the Virginia capitation tax?

A I am. This tax is assessed and collected by local revenue officials under the general supervision of my office.

Q Have you any reason to believe that the capitation tax is administered in such a manner as to discriminate against any taxpayer or class of taxpayers?

A None whatever.

MR. POLLAK: Mr. Harris, would you have the witness state the basis of the opinion which he has been asked to render?

BY MR. HARRIS:

Q Mr. Morrissett, would you state the basis of the opinion which you have been asked to render?

A The basis of my opinion is 39 years of service as State Tax Commissioner of Virginia.

Q All right, sir. Now I will ask you the question again. Have you any reason to believe that the capitation tax is administered in such a manner as to discriminate against any taxpayer or class of taxpayers?

A None whatever. During the 39 years I have been State Tax Commissioner, it has never been reported to me

or to my office that any local revenue official has wilfully neglected to assess the capitation tax against or refused to accept its payment from any person assessable therewith on account of the taxpayer's race, national origin, economic position, faith, or political persuasion. Nor has it been reported to me or to my office that any local revenue official has attempted in any manner to dissuade any person from paying his capitation tax for such reasons. Any local revenue official guilty of such conduct would be subject to severe criticism. It is my firm conviction, based upon my years of experience in office, that local revenue officials make every practical and reasonable effort to assess the capitation tax against and to collect it from all persons assessable therewith under the laws of Virginia, without favor or discrimination toward any, and that the capitation tax is administered objectively, impartially and totally without regard to race, national origin, economic position, faith, or political persuasion.

If any particular person assessable with the tax should not be assessed, it would not be because the assessors wilfully or negligently fail to assess it, but only because they have no information indicating that he is assessable. In the overwhelming majority of cases where any other tax is collectible, the capitation tax is punctually collected. The primary instances in which the tax is not collected are instances where the individual also fails to pay other taxes which are due. In cases where the tax is three years past due, the cost of collection of the capitation tax alone would exceed the amount that could be recovered, and to enforce collection of the capitation tax alone by legal process would simply be economically unfeasible. The only time it would not be economically unfeasible is where other taxes are to be collected from the taxpayer at the same time. And Treasurers, in their efforts to collect other taxes which have become past

due, and in their hands for collection, include State capitation taxes in their efforts, but, of course, cannot threaten legal process at the time as to the State capitation tax.

Collection is economically unfeasible for many reasons. When a person's name appears on a delinquent capitation tax list for one year, the collector could not rely on that, but would be compelled to check to see if the item was paid subsequently. Moreover, many, many persons move from one locality to another in a three-year period (the time during which the collection of the capitation tax cannot be enforced by legal process), to say nothing of removals within a locality, or persons who have moved to points without the State, or persons who have died, with or without leaving estates. In addition to these considerations, the problem of identification would be acute, because a collector would find it necessary to do more than rely on a mere name in calling on a taxpayer to pay a delinquent capitation tax. There is a great confusion of names. The over-all cost of identifying true delinquents and ascertaining their whereabouts would of itself probably be greater than the tax involved, and certainly this would be the case where the cost of identification is added to the cost of actually collecting the tax. In my opinion, taxpayer resistance would be strong and resort to legal process by the collector would be the necessary rule rather than the exception.

Of course, § 58-1163 of the Code of Virginia provides that a person assessable with the capitation tax but not assessed therewith may apply to his local Commissioner of Revenue and have himself assessed with omitted taxes. The Commissioner of Revenue must make the assessment and issue to the taxpayer a certificate of assessment; thereupon, the local Treasurer must receive payment of the taxes set out in the certificate from the taxpayer. Anyone who desires to pay his capitation taxes may do so, even if he has not been assessed at the usual time.

Q Mr. Morrissett, what in your opinion, is the function of the capitation tax in Virginia?

A The capitation tax has gone through a marked evolution since its adoption in the Constitution of 1902. Many of the most vocal members of the Constitutional Convention at that time expressed approval of the capitation tax on the ground that it would tend to retard or prevent voting by members of the Negro race. That result may have prevailed for some years. But the capitation tax certainly is not administered discriminatorily at the present time nor has it been for many years. Realistically viewed, the capitation tax in Virginia today serves three purposes, as follows:

MR. POLLAK: Pardon me, Mr. Morrissett. Mr. Harris, the witness is reading the answers, and I don't wish to interrupt him, but perhaps it would facilitate my understanding and hearing of the statements that are being made if, at least upon conclusion of his testimony in chief, I could review the written statement, because, otherwise, it's moving so rapidly

MR. HARRIS: You can have one to follow. Would you want the comments on the record?

MR. POLLAK: Yes.

MR. HARRIS: We have equally a comment, that you were instantly supplied with one.

By MR. HARRIS:

Q Mr. Morrissett, I believe you were about to tell us what, in your opinion, were the three purposes that the capitation tax serves?

A Yes, sir. Realistically viewed, the capitation tax in Virginia today serves three purposes, as follows:

(1) In the first place, it provides revenue for the State and localities. During the fiscal year 1962-63, capitation

tax revenues were $1,837,646, of which one-third was to be returned to the localities in which it was collected. The balance of about $1,200,000 is almost 1% of the $130,381,661 expended by the Commonwealth for public free school purposes in that year (to which two-thirds of capitation tax revenues are required by Section 173 of the Virginia Constitution to be applied). While this is not a major proportion, the sum of nearly $1.2 million is certainly not without importance to the educational program of the Commonwealth.

(2) In the second place the capitation tax serves as a method of keeping the rolls of registered voters up to date. Registration in Virginia is not annual, but permanent. It follows that there is no way except the capitation tax for proving the continued life and residence of any particular voter. But since the capitation tax is assessable only against residents of Virginia, and is assessed and paid locally, a person who pays it thereby indicates continuing maintenance of his residence in the State and in his locality. The appearance of his name on both the list of persons who have paid the tax and the roll of registered voters provides substantial, objective and credible evidence that he is a qualified resident when he offers to vote. It is not to be expected that a non-resident would pay the tax. If there are exceptions, I believe they constitute a small minority which would exist no matter what plan of verification were followed.

(3) In the third place, and perhaps most important of all, the capitation tax provides a simple and objective test of certain minimal capacity for ordering one's own affairs and thus of qualification to participate in the ordering of the affairs of state. Any intelligence test as such may be interpreted subjectively by the administrative officials and thus applied in a discriminatory manner, as we learn from

Louisiana v. *U.S.*, 380 U.S. 145 (1965) and *U.S.* v. *Mississippi*, 380 U.S. ——, both decided in 1965. But the capitation tax is as mechanical as the calendar. There is no need for any voter to predetermine the date of any ordinary or special election. All he has to do is pay his $1.50 every year by December 5 and, assuming registration, he is entitled to vote at every election that takes place. If he has income or taxable property, he will in all probability be billed for the capitation tax. If he has neither but can still be identified by the Commissioner of Revenue, he will also be assessed and billed. Failing any of these, he can nevertheless, if he is interested, give his name to the Commissioner of Revenue, receive the assessment and pay the tax and having done this once, he will in all probability be billed every year from then on. This is, in short, the simplest, most equal, non-discriminatory and objective test of minimum intelligence and responsibility that could be devised.

Q Now in addition to those purposes, does the capitation tax have any other purpose, in your opinion?

A Yes, I believe that payment of the capitation tax is in accord with the standard proclaimed in the Virginia Declaration of Rights, written by George Mason in 1776; that all men "having sufficient evidence of permanent common interest with, and attachment to, the community" shall have the right to vote. This is in Section 6 of the Constitution of Virginia. As I pointed out previously, payment of a capitation poll tax does supply evidence of residence within the community, but of even more importance, in my judgment, is the evidence it supplies of common interest with and attachment to the community. I can think of no better way for the citizen and prospective voter, whatever the particularities of his position, to demonstrate his common interest with and attachment to his State and his community than

to respect the common requirement for due and timely payment of the trifling and token sum expected of all citizens to qualify themselves for suffrage.

MR. HARRIS: Your witness.

APPENDIX B

History of State Action

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History of State Action

In most States, ratification or rejection of the Amendment was perfunctory. Normal procedure was that the Amendment was transmitted to the legislature together with a brief message from the governor commenting upon it and urging ratification or rejection; the legislature usually acted swiftly in accordance with the governor's recommendations. A few states published committee reports in their legislative journals; Pennsylvania was the sole state to publish the debates of its legislature.

Most governors' messages merely praise the Amendment and press ratification; those that go any further into the matter are to the same effect as the debates in Congress. Governor Chamberlain of Maine expressed disappointment that the Amendment did not confer the right to vote upon the Negro. He said

> "Imperfect as this [Amendment] was, as hazarding one of the very fruits of our victory by placing it in the power of the South to introduce into the Constitution a disability founded on race and color, still . . . good faith doubtless requires us to support it." Me. House J. 20 (1867).

Governor Brownlow of Tennessee, the first former Confederate State to ratify the Amendment and the third in the nation to do so, said, shortly after the legislature had acted, in a message recommending enfranchisement of Negroes,

> "While it is true that this amendment leaves with the States, as heretofore, the regulation of the elective franchise, it is equally true that it encourages the enfranchisement of all loyal male citizens of whatever color." Tenn. House J., App. 4 (1866).

Significantly, the governors of Kansas, Minnesota and Nebraska recommended in the same messages in which they recommended ratification of the Amendment that the State constitutions be amended so as to allow Negroes to vote. Kan. Sen. J. 45 (1867); Minn. Exec. Doc., Doc. No. 1, 25 (1865-66); Neb. House J. 27 (1867). Likewise, the incoming governor of Iowa, in his inaugural address delivered shortly after the address of the incumbent urging ratification, recommended enfranchisement of the Negro. Iowa Sen. J. 47 (1868). It is more likely that this was to avoid the penalty of proportionate reduction in representation than merely to remove void material from the books.

The only governor to take a contrary view of the Amendment was Governor Orr of South Carolina.[1] He declared that the first and last sections of the Amendment "confer upon Congress the absolute right of determining . . . who shall exercise the elective franchise." S. C. House J. 34 (1866). This statement may be discounted, however, for it was made in a speech urging rejection of the Amendment, and the alarmist views of opponents of a legislative measure cannot be considered in questions of construction.[2] Moreover, Governor Orr's statement appeared to be based upon a theory that suffrage is one of the "privileges and immunities" of citizens of the United States protected from State interference by the first section of the Amendment and consequently subjected to Congress' jurisdiction by the fifth—a theory repudiated by the Court only seven years

[1]South Carolina rejected the Amendment in 1866, but subsequently ratified it in 1868.

[2]*Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951):

> The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.

after the ratification of the Amendment was proclaimed, in *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162 (1875).[3]

The majority reports of State legislative committees on the Amendment are generally brief recommendations for ratification. One exception is the report of the Massachusetts House Committee on Federal Relations, Mass. Legis. Doc., House Doc. No. 149 (1867). The Committee was highly dissatisfied with the Amendment, although it recommended that it be retained on the legislative agenda. The first section, the Committee held, merely restated what it conceived to be constitutional verities and was thus superfluous. The second section was objectionable because it permitted the States to deny the right to vote to Negroes, and thus confirmed a constitutional doctrine with which it (and Senator Sumner of Massachusetts) disagreed: that under the unamended Constitution, the States had the exclusive right to regulate suffrage. The penalty for disfranchisement was deemed inadequate. Finally, the Committee noted that provisions of the Massachusetts Constitution which disfranchised paupers and nontaxpayers would bring Massachusetts under the second section. It said:

> "[I]f the supreme court should decide, as it must be admitted it could legitimately do, that the requirement of the payment of a tax is an abridgment of the right to vote, our entire basis of representation is annihilated at one fell swoop." Mass. Legis. Doc., House Doc. No. 149, at 14 (1867).

The Committee never suggested that the requirements themselves were rendered unconstitutional by the first section of the Amendment. Its understanding was clearly that

[3]This argument was also advanced by other opponents of the Amendment. See Globe 2538 (remarks of Representative Rogers); N.C. Sen. J. 96-99 (1866-67); Tex. Sen. J., App. 421-22 (1866); Tex. House J. 578 (1866); Pa. Legis. Rec., App. XXV, LI, LII, LIV, LX, LXVII, LXXX (1867).

Massachusetts would retain the power to disfranchise for pauperism or failure to pay taxes, but if it continued to exercise that power, it would suffer the penalty of reduced representation in Congress.

The minority report of the New Hampshire Select Committee on the Constitutional Amendment, N.H. House J. 176-78 (1866) is also interesting. The Amendment was first said to be self-contradictory. After suggesting that the right to vote is a privilege protected by the first section, the minority noted that the second section, by inference, allowed the States to "restrict the right of suffrage if willing to submit to the consequent disabilities." (176) Also, the Amendment was objectionable because its second section penalized the States

> "for regulating, in their own way, the right of suffrage —clearly, a State right; a right vital to the theory of our government, and most carefully guarded by the framers of the Constitution." (177)

Again, the second section was bad because its effect, if adopted,

> "must be to degrade that priceless boon,—the elective franchise,—and cause a race and scramble in all the States to remove those time-honored restrictions upon the right of voting which the experience of the past has proved to be necessary and just. . . ." (177)

Thus, except for the brief and subsequently implicitly abandoned suggestion that the first section's "privileges and immunities" clause embraced the right to vote, the minority report holds that it is the second section alone that affects suffrage—the "time-honored restrictions" on the right to vote are not voided by the first section; instead, pressure for their removal is applied by the second.

The only other committee report of a "loyal" State legislature to go into the matter in any depth is the minority report of the Wisconsin Committee on Federal Relations. Although the minority professed to favor Negro suffrage, it objected to the compulsive effect of the second section of the Amendment. There was no suggestion that the first section automatically prevented the States from denying the right to vote to the Negro. Wis. Sen. J. 102-03 (1867).

Discussion of the Amendment in the Pennsylvania legislature parallels the discussion in Congress. It was repeatedly affirmed by proponents of the Amendment that it did not affect the States' control over suffrage. The following excerpts from the remarks of Senator Landon are typical:

> "I will say that I dislike the second [section of the] amendment. We cannot change it; but if I had been in the body which drafted it, I would have fought it to the very utmost. I shall vote for it, because we must vote for or against them all. It proposes to leave the four millions of colored people in the South at the disposal of the white rebels. It says to them, you may determine whether these men shall vote or not." Pa. Legis. Rec., App. IX (1867).

To the same effect are the remarks of Senator Bigham:

> "It is especially unkind in the Senator . . . to make an onslaught on the second [section of the] amendment. Suffrage is a natural right belonging to the States. Now, the object of the second [section of the] amendment is precisely what the Senator . . . is in favor of; it ratifies and confirms, for all future time, the power of the States to regulate this question of suffrage. Now, if that Senator believes in his own argument, he is compelled to go for the second [section of the] amendment, for it guarantees to each State for all future time, just what he argues each state ought to have." Pa. Legis. Rec., App. XVI (1867).

and of Senator Taylor:

> "The second section, when stripped of all legal technicality and verbosity, simply provides that if a State shall choose to disfranchise any class or portion of its citizens, such State shall suffer a diminution of representative power in the Federal Union, in exact ratio to the number of her citizens so disfranchised. . . . [I]t is clear that the subject of suffrage is left, by the provision of this section, to regulate itself in each State. . . ." Pa. Legis. Rec., App. XXII (1867).

and of Representative Day:

> "We refer the whole question of suffrage to the States. We enforce negro suffrage nowhere, but we do say to the late slaveholding States, and to all States, if you deny the ballot to the freedmen, you shall not usurp it for yourselves." Pa. Legis. Rec., App. LXVI (1867).

SUPREME COURT OF THE UNITED STATES

Nos. 48 AND 655.—OCTOBER TERM, 1965.

Annie E. Harper et al., Appellants, 48 *v.* Virginia State Board of Elections et al. Evelyn Butts, Appellant, 655 *v.* Albertis Harrison, Governor, et al.	On Appeals From the United States District Court for the Eastern District of Virginia.

[March 24, 1966.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These are suits by Virginia residents to have declared unconstitutional Virginia's poll tax.[1] The three-judge

[1] Section 173 of Virginia's Constitution directs the General Assembly to levy an annual poll tax not exceeding $1.50 on every resident of the State 21 years of age and over (with exceptions not relevant here). One dollar of the tax is to be used by state officials "exclusively in aid of the public free schools" and the remainder is to be returned to the counties for general purposes. Section 18 of the Constitution includes payment of poll taxes as preconditions for voting. Section 20 provides that a person must "personally" pay all state poll taxes for the three years preceding the year in which he applies for registration. By § 21 the poll tax must be paid at least six months prior to the election in which the voter seeks to vote. Since the time for election of state officials varies (24 Va. Code §§ 136, 160–168; *Id.*, at § 22), the six months' deadline will vary, election from election. The poll tax is often assessed along with the personal property tax. 58 Va. Code § 836. Those who do not pay a personal property tax are not assessed for a poll tax, it being their responsibility to take the initiative and request to be assessed. 58 Va. Code § 1163. Enforcement of poll taxes takes the form of

District Court, feeling bound by our decision in *Breedlove* v. *Suttles*, 302 U. S. 277, dismissed the complaint. See 240 F. Supp. 270. The cases came here on appeal and we noted probable jurisdiction. 380 U. S. 930, 382 U. S. 806.

While the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution (*United States* v. *Classic*, 313 U. S. 299, 314–315), the right to vote in state elections is nowhere expressly mentioned. It is argued that the right to vote in state elections is implicit, particularly by reason of the First Amendment and that it may not constitutionally be conditioned upon the payment of a tax or fee. Cf. *Murdock* v. *Pennsylvania*, 319 U. S. 105, 113.[2] We do not stop to canvass the relation between voting and political expression. For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. That is to say, the right of suffrage "is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed." *Lassiter* v. *Northampton Education Board*, 360 U. S. 45, 51. We were speaking there of a state literacy test which we

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disenfranchisement of those who do not pay, § 22 of the Virginia Constitution providing that collection of delinquent poll taxes for a particular year may not be enforced by legal proceedings until the tax for that year has become three years delinquent.

[2] Judge Thornberry, speaking for the three-judge court which recently declared the Texas poll tax unconstitutional, said: "If the State of Texas placed a tax on the right to speak at the rate of one dollar and seventy-five cents per year, no court would hesitate to strike it down as a blatant infringement of the freedom of speech. Yet the poll tax as enforced in Texas is a tax on the equally important right to vote." — F. Supp. —, — (decided February 9, 1966).

sustained, warning that the result would be different if a literacy test, fair on its face, were used to discriminate against a class.[3] *Id.*, at 53. But the *Lassiter* case does not govern the result here, because, unlike a poll tax, the "ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot." *Id.*, at 51.

We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.[4] Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate. Thus without questioning the power of a State to

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[3] We recently held in *Louisiana* v. *United States*, 380 U. S. 145, that a literacy test which gave voting registrars "a virtually uncontrolled discretion as to who should vote and who should not" (*id.*, at 150) had been used to deter Negroes from voting and accordingly we struck it down. While the "Virginia poll tax was born of a desire to disenfranchise the Negro" (*Harman* v. *Forssenius*, 380 U. S. 528, 543), we do not stop to determine whether on this record the Virginia tax in its modern setting serves the same end.

[4] Only a handful of States today condition the franchise on the payment of a poll tax. Alabama (Ala. Const., § 178, and Amendments 96, 194, and 207; 17 Ala. Code § 12) and Texas (Tex. Const., Art. 6, § 2; Vernon's Ann. Stat., Election Code, Arts. 5.02, 5.09) each impose a poll tax of $1.50. Mississippi (Miss. Const., §§ 241, 243; Miss. Code §§ 3130, 3160, 3235) has a poll tax of $2. Vermont has recently eliminated the requirement that poll taxes be paid in order to vote. Act of Feb. 23, 1966, amending 24 Vt. Stat. Ann. § 701.

As already noted, note 2, *supra*, the Texas poll tax was recently declared unconstitutional by a three-judge United States District Court. *United States* v. *Texas*, — F. Supp. — (decided February 9, 1966). Likewise, the Alabama tax. *United States* v. *Alabama*, — F. Supp. — (decided March 3, 1966).

impose reasonable residence restrictions on the availability of the ballot (see *Pope* v. *Williams*, 193 U. S. 621), we held in *Carrington* v. *Rash*, 380 U. S. 89, that a State may not deny the opportunity to vote to a bona fide resident merely because he is a member of the armed services. "By forbidding a soldier ever to controvert the presumption of non-residence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment." *Id.*, at 96. And see *Louisiana* v. *United States*, 380 U. S. 145. Previously we had said that neither homesite nor occupation "affords a permissible basis for distinguishing between qualified voters within the State." *Gray* v. *Sanders*, 372 U. S. 368, 380. We think the same must be true of requirements of wealth or affluence or payment of a fee.

Long ago in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370, the Court referred to "the political franchise of voting" as a "fundamental political right, because preservative of all rights." Recently in *Reynolds* v. *Sims*, 377 U. S. 533, 561–562, we said, "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." There we were considering charges that voters in one part of the State had greater representation per person in the State Legislature than voters in another part of the State. We concluded:

> "A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's

> vision of 'government of the people, by the people, [and] for the people.' The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races." *Id.*, at 568.

We say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it. The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay.

It is argued that a State may exact fees from citizens for many different kinds of licenses; that if it can demand from all an equal fee for a driver's license,[5] it can demand from all an equal poll tax for voting. But we must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race (*Korematsu* v. *United States*, 323 U. S. 214, 216), are traditionally disfavored. See *Edwards* v. *California*, 314 U. S. 160, 184–185 (Jackson, J., concurring); *Griffin* v. *Illinois*, 351 U. S. 12; *Douglas* v. *California*, 372 U. S. 353. To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an "invidious" discrimination (*Skinner* v. *Okla-*

[5] Maine has a poll tax (36 Maine Rev. Stat. Ann. § 1381) which is not made a condition of voting; instead, its payment is a condition of obtaining a motor vehicle license (29 Maine Rev. Stat. Ann. § 108) or a motor vehicle operator's license. *Id.*, § 584.

homa, 316 U. S. 535, 541) that runs afoul of the Equal Protection Clause. Levy "by the poll," as stated in *Breedlove* v. *Suttles*, *supra*, at 281, is an old familiar form of taxation; and we say nothing to impair its validity so long as it is not made a condition to the exercise of the franchise. *Breedlove* v. *Suttles* sanctioned its use as "a prerequisite of voting." *Id.*, at 283. To that extent the *Breedlove* case is overruled.

We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics" (*Lochner* v. *New York*, 198 U. S. 45, 75). Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. See *Malloy* v. *Hogan*, 378 U. S. 1, 5–6. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. This Court in 1896 held that laws providing for separate public facilities for white and Negro citizens did not deprive the latter of the equal protection and treatment that the Fourteenth Amendment commands. *Plessy* v. *Ferguson*, 163 U. S. 537. Seven of the eight Justices then sitting subscribed to the Court's opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear.[6] When, in 1954—more than a half-century later—we

[6] *E. g.*, "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." 163 U. S., at 551.

repudiated the "separate-but-equal" doctrine of *Plessy* as respects public education[7] we stated: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written." *Brown* v. *Board of Education*, 347 U. S. 483, 492.

In a recent searching re-examination of the Equal Protection Clause, we held, as already noted, that "the opportunity for equal participation by all voters in the election of state legislators" is required.[8] *Reynolds* v. *Sims*, *supra*, at 566. We decline to qualify that principle by sustaining this poll tax. Our conclusion, like that in *Reynolds* v. *Sims*, is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires.

We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. See, *e. g.*, *Skinner* v. *Oklahoma*, 316 U. S. 535, 541; *Reynolds* v. *Sims*, 377 U. S. 533, 561–562; *Carrington* v. *Rash*, *supra*; *Baxstrom* v. *Herold*, 382 U. S. ——; *Cox* v. *Louisiana*, 379 U. S. 536, 580–581 (BLACK, J., concurring).

Those principles apply here. For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.

Reversed.

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[7] Segregated public transportation, approved in *Plessy* v. *Ferguson*, *supra*, was held unconstitutional in *Gayle* v. *Browder*, 352 U. S. 903 (per curiam).

[8] Only MR. JUSTICE HARLAN dissented, while MR. JUSTICE CLARK and MR. JUSTICE STEWART each concurred on separate grounds.

SUPREME COURT OF THE UNITED STATES

Nos. 48 AND 655.—OCTOBER TERM, 1965.

Annie E. Harper et al., Appellants, 48 v. Virginia State Board of Elections et al.	On Appeals From the United States District Court for the Eastern District of Virginia.
Evelyn Butts, Appellant, 655 v. Albertis Harrison, Governor, et al.	

[March 24, 1966.]

MR. JUSTICE BLACK, dissenting.

In *Breedlove* v. *Suttles*, 302 U. S. 277, decided December 6, 1937, a few weeks after I took my seat as a member of this Court, we unanimously upheld the right of the State of Georgia to make payment of its state poll tax a prerequisite to voting in state elections. We rejected at that time contentions that the state law violated the Equal Protection Clause of the Fourteenth Amendment because it put an unequal burden on different groups of people according to their age, sex, and ability to pay. In rejecting the contention that the law violated the Equal Protection Clause the Court noted at p. 281:

> "While possible by statutory declaration to levy a poll tax upon every inhabitant of whatsoever sex, age or condition, collection from all would be impossible for always there are many too poor to pay."

Believing at that time that the Court had properly respected the limitation of its power under the Equal Protection Clause and was right in rejecting the equal protection argument, I joined the Court's judgment and

opinion. Later, May 28, 1951, I joined the Court's judgment in *Butler* v. *Thompson*, 341 U. S. 937, upholding, over the dissent of MR. JUSTICE DOUGLAS, the Virginia state poll tax law challenged here against the same equal protection challenges. Since the *Breedlove* and *Butler* cases were decided the Federal Constitution has not been amended in the only way it could constitutionally have been, that is, as provided in Article V [1] of the Constitution. I would adhere to the holding of those cases. The Court, however, overrules *Breedlove* in part but its opinion reveals that it does so not by using its limited power to interpret the original meaning of the Equal Protection Clause, but by giving that clause a new meaning which it believes represents a better governmental policy. From this action I dissent.

It should be pointed out at once that the Court's decision is to no extent based on a finding that the Virginia law as written or as applied is being used as a device or mechanism to deny Negro citizens of Virginia the right to vote on account of their color. Apparently the Court agrees with the District Court below and with my Brothers HARLAN and STEWART that this record would not support any finding that the Virginia poll tax law

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[1] Article V of the Constitution provides:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the Ninth Section of the First Article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

the Court invalidates has any such effect. If the record could support a finding that the law as written or applied has such an effect, the law would of course be unconstitutional as a violation of the Fourteenth and Fifteenth Amendments and also 42 U. S. C. § 1971 (a). This follows from our holding in *Schnell* v. *Davis*, 336 U. S. 933, affirming 81 F. Supp. 872 (D. C. S. D. Ala.); *Gomillion* v. *Lightfoot*, 364 U. S. 339; *United States* v. *Mississippi*, 380 U. S. 128; *Louisiana* v. *United States*, 380 U. S. 145. What the Court does hold is that the Equal Protection Clause necessarily bars all States from making payment of a state tax, any tax, a prerequisite to voting.

(1) I think the interpretation that this Court gave the Equal Protection Clause in *Breedlove* was correct. The mere fact that a law results in treating some groups differently from others does not, of course, automatically amount to a violation of the Equal Protection Clause. To bar a State from drawing any distinctions in the application of its laws would practically paralyze the regulatory power of legislative bodies. Consequently "The constitutional command for a state to afford 'equal protection of the laws' sets a goal not attainable by the invention and the application of a precise formula." *Kotch* v. *River Port Pilot Comms.*, 330 U. S. 552, 556. Voting laws are no exception to this principle. All voting laws treat some persons differently from others in some respects. Some bar a person from voting who is under 21 years of age; others bar those under 18. Some bar convicted felons or the insane, and some have attached a freehold or other property qualification for voting. The *Breedlove* case upheld a poll tax which was imposed on men but was not equally imposed on women and minors, and the Court today does not overrule that part of *Breedlove* which approved those discriminatory provisions. And in *Lassiter* v. *Northampton Election Board*, 360 U. S. 45, this Court held that state laws which

disqualified the illiterate from voting did not violate the Equal Protection Clause. From these cases and all the others decided by this Court interpreting the Equal Protection Clause it is clear that some discriminatory voting qualifications can be imposed without violating the Equal Protection Clause.

A study of our cases shows that this Court has refused to use the general language of the Equal Protection Clause as though it provided a handy instrument to strike down state laws which the Court feels are based on bad governmental policy. The equal protection cases carefully analyzed boil down to the principle that distinctions drawn and even discriminations imposed by state laws do not violate the Equal Protection Clause so long as these distinctions and discriminations are not "irrational," "irrelevant," "unreasonable," "arbitrary," or "invidious." [2] These vague and indefinite terms do not, of course, provide a precise formula or an automatic mechanism for deciding cases arising under the Equal Protection Clause. The restrictive connotations of these terms, however (which in other contexts have been used to expand the Court's power inordinately, see, *e. g.*, cases cited at pp. 728–732 in *Ferguson* v. *Skrupa*, 372 U. S. 727), are a plain recognition of the fact that under a proper interpretation of the Equal Protection Clause States are to have the broadest kind of leeway in areas where they have a general constitutional competence to act.[3] In view of the purpose of the terms to restrain the

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[2] See, *e. g.*, *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522; *Goesaert* v. *Cleary*, 335 U. S. 464; *Skinner* v. *Oklahoma*, 316 U. S. 535, *Minnesota* v. *Probate Court*, 309 U. S. 270; *Smith* v. *Cahoon*, 283 U. S. 553; *Watson* v. *Maryland*, 218 U. S. 173.

[3] "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Metropolitan Co.* v. *Brownell*, 294 U. S. 580, 584 (Stone, J.).

courts from a wholesale invalidation of state laws under the Equal Protection Clause it would be difficult to say that the poll tax requirement is "irrational" or "arbitrary" or works "invidious discriminations." State poll tax legislation can "reasonably," "rationally" and without an "invidious" or evil purpose to injure anyone be found to rest on a number of state policies including (1) the State's desire to collect its revenue, and (2) its belief that voters who pay a poll tax will be interested in furthering the State's welfare when they vote. Certainly it is rational to believe that people may be more likely to pay taxes if payment is a prerequisite to voting. And if history can be a factor in determining the "rationality" of discrimination in a state law (which we held it could in *Kotch* v. *River Port Pilots Comms., supra*), then whatever may be our personal opinion, history is on the side of "rationality" of the State's poll tax policy. Property qualifications existed in the Colonies and were continued by many States after the Constitution was adopted. Although I join the Court in disliking the policy of the poll tax, this is not in my judgment a justifiable reason for holding this poll tax law unconstitutional. Such a holding on my part would, in my judgment, be an exercise of power which the Constitution does not confer upon me.[4]

[4] The opinion of the Court, in footnote two, quotes language from a federal district court's opinion which implies that since a tax on speech would not be constitutionally allowed a tax which is a prerequisite to voting likewise cannot be allowed. But a tax or any other regulation which burdens and actually abridges the right to speak would, in my judgment, be a flagrant violation of the First Amendment's prohibition against abridgments of the freedom of speech which prohibition is made applicable to the States by the Fourteenth Amendment. Cf. *Murdock* v. *Pennsylvania*, 319 U. S. 105. There is no comparable specific constitutional provision absolutely barring the States from abridging the right to vote. Consequently States have from the beginning and do now qualify the

(2) Another reason for my dissent from the Court's judgment and opinion is that it seems to be using the old "natural-law-due-process formula" [5] to justify striking down state laws as violations of the Equal Protection Clause. I have heretofore had many occasions to express my strong belief that there is no constitutional support whatever for this Court to use the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written so as to add to it substantive constitutional changes which a majority of the Court at any given time believes are needed to meet present-day problems.[6] Nor is there in my opinion any more constitutional support for this Court to use the Equal Protection Clause, as it has today, to write into the Constitution its notions of what it thinks is good governmental policy. If basic changes as to the respective powers of the state and national governments are needed, I prefer to let those changes be made by amendment as Article V of the Constitution provides. For a majority of this Court to undertake that task, whether purporting to do so under the Due Process or the Equal Protection Clause amounts, in my judgment, to an exercise of power the Constitution makers with foresight and wisdom refused to give the Judicial Branch of the Government. I have in no way departed from the view I expressed in *Adamson* v. *California, supra,* at p. 90, decided June 23, 1947, that the "natural-law-due-process formula" under which courts make the Constitution mean what they

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right to vote because of age, prior felony convictions, illiteracy, and various other reasons. Of course the First and Fourteenth Amendments forbid any State from abridging a person's right to speak because he is under 21 years of age, has been convicted of a felony, or is illiterate.

[5] See my dissenting opinion in *Adamson* v. *California,* 332 U. S. 46, 90.

[6] See for illustration my dissenting opinion in *Griswold* v. *Connecticut,* 381 U. S. 479, 507, and cases cited therein.

think it should at a given time "has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government."

The Court denies that it is using the "natural-law-due-process formula." It says that its invalidation of the Virginia law "is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires." I find no statement in the Court's opinion, however, which advances even a plausible argument as to why the alleged discriminations which might possibly be effected by Virginia's poll tax law are "irrational," "unreasonable," "arbitrary," or "invidious" or have no relevance to a legitimate policy which the State wishes to adopt. The Court gives no reason at all to discredit the long-standing beliefs that making the payment of a tax a prerequisite to voting is an effective way of collecting revenue and that people who pay their taxes are likely to have a far greater interest in their government. The Court's failure to give any reasons to show that these purposes of the poll tax are "irrational," "unreasonable," "arbitrary," or "invidious" is a pretty clear indication to me that none exist. I can only conclude that the primary, controlling, predominant, if not the exclusive reason for declaring the Virginia law unconstitutional is the Court's deep-seated hostility and antagonism, which I share, to making payment of a tax a prerequisite to voting.

The Court's justification for consulting its own notions rather than following the original meaning of the Constitution, as I would, apparently is based on the belief of the majority of the Court that for this Court to be bound by the original meaning of the Constitution is an intolerable and debilitating evil; that our Constitution

should not be "shackled to the political theory of a particular era," and that to save the country from the original Constitution the Court must have constant power to renew it and keep it abreast with this Court's more enlightened theories of what is best for our society.[1] It seems to me that this is not only an attack on the great value of our Constitution itself but also on the concept of a written constitution which is to survive

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[1] In *Brown* v. *Board of Education*, 347 U. S. 483, the Court today purports to find precedent for using the Equal Protection Clause to keep the Constitution up to date. I did not vote to hold segregation in public schools unconstitutional on any such theory. I thought when *Brown* was written, and I think now that Mr. Justice Harlan was correct in 1896 when he dissented from *Plessy* v. *Ferguson*, 163 U. S. 537, which held that it was not a discrimination prohibited by the Equal Protection Clause for state law to segregate white and colored people in public facilities, there railroad cars. I did not join the opinion of the Court in *Brown* on any theory that segregation where practiced in the public schools denied equal protection in 1954 but did not similarly deny it in 1868 when the Fourteenth Amendment was adopted. In my judgment the holding in *Brown* against racial discrimination was compelled by the purpose of the Framers of the Thirteenth, Fourteenth and Fifteenth Amendments completely to outlaw discrimination against people because of their race or color. See the *Slaughter House Cases*, 16 Wall. 36, 71–72; *Nixon* v. *Herndon*, 273 U. S. 536, 541.

Nor does *Malloy* v. *Hogan*, 378 U. S. 1, stand as precedent for the amendatory power which the Court exercises today. The Court in *Malloy* did not read into the Constitution its own notions of wise criminal procedure, but instead followed the doctrine of *Palko* v. *Connecticut*, 302 U. S. 319 and made the Fifth Amendment's unequivocal protection against self-incrimination applicable to the States. I joined the opinion of the Court in *Malloy* on the basis of my dissent in *Adamson* v. *California*, *supra*, in which I stated, at p. 89:

"If the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process."

through the years as originally written unless changed through the amendment process which the Framers wisely provided. Moreover, when a "political theory" embodied in our Constitution becomes outdated, it seems to me that a majority of the nine members of this Court are not only without constitutional power but are far less qualified to choose a new constitutional political theory than the people of this country proceeding in the manner provided by Article V.

The people have not found it impossible to amend their Constitution to meet new conditions. The Equal Protection Clause itself is the product of the peoples' desire to use their constitutional power to amend the Constitution to meet new problems. Moreover, the people, in §5 of the Fourteenth Amendment, designated the governmental tribunal they wanted to provide additional rules to enforce the guarantees of that Amendment. The branch of Government they chose was not the Judicial Branch but the Legislative. I have no doubt at all that Congress has the power under § 5 to pass legislation to abolish the poll tax in order to protect the citizens of this country if it believes that the poll tax is being used as a device to deny voters equal protection of the law. See my concurring and dissenting opinion in *South Carolina* v. *Katzenbach*, *post*, —. But this legislative power which was granted to Congress by § 5 of the Fourteenth Amendment is limited to Congress.[8] This Court had occasion to discuss this very subject in

[8] But § 1 of the Fourteenth Amendment itself outlaws any state law which either as written or as applied discriminates against voters on account of race. Such a law can never be rational. "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right [to vote] set up in this case." *Nixon* v. *Herndon*, 273 U. S. 536, 541 (Holmes, J.).

Ex parte Virginia, 100 U. S. 339, 345. There this Court said, referring to the fifth section of the Amendment:

> "All of the amendments derive much of their force from this latter provision. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. *It is the power of Congress which has been enlarged.* Congress is authorized *to enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." (Emphasis partially supplied).

Thus § 5 of the Fourteenth Amendment in accordance with our constitutional structure of government authorizes the Congress to pass definitive legislation to protect Fourteenth Amendment rights which it has done many times, *e. g.*, 42 U. S. C. § 1971 (a). For Congress to do this fits in precisely with the division of powers originally entrusted to the three branches of government—Executive, Legislative, and Judicial. But for us to undertake in the guise of constitutional interpretation to decide the constitutional policy question of this case amounts, in my judgment, to a plain exercise of power which the Constitution has denied us but has specifically granted to Congress. I cannot join in holding that the Virginia state poll tax law violates the Equal Protection Clause.

SUPREME COURT OF THE UNITED STATES

Nos. 48 and 655.—October Term, 1965.

Annie E. Harper et al., Appellants, 48 *v.* Virginia State Board of Elections et al. Evelyn Butts, Appellant, 655 *v.* Albertis Harrison, Governor, et al.	On Appeals From the United States District Court for the Eastern District of Virginia.

[March 24, 1966.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, dissenting.

The final demise of state poll taxes, already totally proscribed by the Twenty-Fourth Amendment with respect to federal elections and abolished by the States themselves in all but four States with respect to state elections,[1] is perhaps in itself not of great moment. But the fact that the *coup de grace* has been administered by this Court instead of being left to the affected States or to the federal political process[2] should be a matter of continuing concern to all interested in maintaining the proper role of this tribunal under our scheme of government.

I do not propose to retread ground covered in my dissents in *Reynolds* v. *Sims*, 377 U. S. 533, 589, and

[1] Alabama, Mississippi, Texas, and Virginia.

[2] In the Senate hearings leading to the passage of the Civil Rights Act of 1965, some doubt was expressed whether state poll taxes could be validly abolished through the exercise of Congress' legislative power under § 5 of the Fourteenth Amendment. See Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 194–197 (1965). I intimate no view on that question.

Carrington v. *Rash*, 380 U. S. 89, 97, and will proceed on the premise that the Equal Protection Clause of the Fourteenth Amendment now reaches both state apportionment (*Reynolds*) and voter-qualification (*Carrington*) cases. My disagreement with the present decision is that in holding the Virginia poll tax violative of the Equal Protection Clause the Court has departed from long-established standards governing the application of that clause.

The Equal Protection Clause prevents States from arbitrarily treating people differently under their laws. Whether any such differing treatment is to be deemed arbitrary depends on whether or not it reflects an appropriate differentiating classification among those affected; the clause has never been thought to require equal treatment of all persons despite differing circumstances. The test evolved by this Court for determining whether an asserted justifying classification exists is whether such a classification can be deemed to be founded on some rational and otherwise constitutionally permissible state policy. See, *e. g.*, *Powell* v. *Pennsylvania*, 127 U. S. 678; *Barrett* v. *Indiana*, 229 U. S. 26; *Walters* v. *City of St. Louis*, 347 U. S. 231; *Baxstrom* v. *Herold*, 382 U. S. —. This standard reduces to a minimum the likelihood that the federal judiciary will judge state policies in terms of the individual notions and predilections of its own members, and until recently it has been followed in all kinds of "equal protection" cases.[3]

[3] I think the somewhat different application of the Equal Protection Clause to racial discriminaiton cases finds justification in the fact that insofar as that clause may embody a particular value in addition to rationality, the historical origins of the Civil War Amendments might attribute to racial equality this special status. See, *e. g.*, *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Shelley* v. *Kraemer*, 334 U. S. 1; *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410; *Brown* v. *Board of Education*, 347 U. S. 483; *Evans* v. *Newton*,

Reynolds v. *Sims*, *supra*, among its other breaks with the past, also marked a departure from these traditional and wise principles. Unless its "one man, one vote" thesis of state legislative apportionment is to be attributed to the unsupportable proposition that "Equal Protection" simply means indiscriminate equality, it seems inescapable that what *Reynolds* really reflected was but this Court's own views of how modern American representative government should be run. For it can hardly be thought that no other method of apportionment may be considered rational. See the dissenting opinion of STEWART, J., in *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U. S. 713, 744, and my own dissenting opinion in *Reynolds* v. *Sims*, *supra*, at pp. 615–624.

Following *Reynolds* the Court in *Carrington* v. *Rash*, 380 U. S. 89, applied the traditional equal protection standard in striking down a Texas statute disqualifying as voters in state elections certain members of the

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382 U. S. —; cf. *Korematsu* v. *United States*, 323 U. S. 214, 216. See Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1949); Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 33 (1959).

A similar characterization of indigency as a "neutral fact," irrelevant or suspect for purposes of legislative classification, has never been accepted by this Court. See *Edwards* v. *California*, 314 U. S. 160, 184–185 (Jackson, J., concurring). *Griffin* v. *Illinois*, 351 U. S. 12, requiring free trial transcripts for indigent appellants, and *Douglas* v. *California*, 372 U. S. 353, requiring the appointment of counsel for such appellants, cannot fairly be so interpreted for although reference was made indiscriminately to both equal protection and due process the analysis was cast primarily in terms of the latter.

More explicit attempts to infuse "Equal Protection" with specific values have been unavailing. See, *e. g.*, *Patsone* v. *Pennsylvania*, 232 U. S. 138 (alienage); *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (sex); *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U. S. 552, 564 (Rutledge, J., dissenting) (consanguinity).

Armed Forces of the United States.[4] But today in holding unconstitutional state poll taxes and property qualifications for voting and *pro tanto* overruling *Breedlove* v. *Suttles*, 302 U. S. 277, and *Butler* v. *Thompson*, 341 U. S. 937, the Court reverts to the highly subjective judicial approach manifested by *Reynolds*. In substance the Court's analysis of the equal protection issue goes no further than to say that the electoral franchise is "precious" and "fundamental," *ante*, p. 7, and to conclude that "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor," *ante*, p. 5. These are of course captivating phrases, but they are wholly inadequate to satisfy the standard governing adjudication of the equal protection issue: Is there a rational basis for Virginia's poll tax as a voting qualification? I think the answer to that question is undoubtedly "yes."[5]

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[4] So far as presently relevant, my dissent in that case rested not on disagreement with the equal protection standards employed by the Court but only on disagreement with their application in that instance. 380 U. S., at 99–101.

[5] I have no doubt that poll taxes that deny the right to vote on the basis of race or color violate the Fifteenth Amendment and can be struck down by this Court. That question is presented to us in *Butts* v. *Harrison*, No. 655, one of the companion cases decided today. The Virginia poll tax is on its face applicable to all citizens, and there was no allegation that it was discriminatorily enforced. The District Court explicitly found "no racial discrimination . . . in its application as a condition of voting." 240 F. Supp. 270, 271. Appellant in *Butts*, *supra*, argued first, that the Virginia Constitutional Convention of 1902, which framed the poll-tax provision, was guided by a desire to reduce Negro suffrage, and second, that because of the generally lower economic standard of Negroes as contrasted with whites in Virginia the tax does in fact operate as a significant obstacle to voting by Negroes. The Court does not deal with this Fifteenth Amendment argument, and it suffices for me to say that on the record here I do not believe that the factors alluded to are

Property qualifications and poll taxes have been a traditional part of our political structure. In the Colonies the franchise was generally a restricted one.[6] Over the years these and other restrictions were gradually lifted, primarily because popular theories of political representation had changed.[7] Often restrictions were lifted only after wide public debate. The issue of woman suffrage, for example, raised questions of family relationships, of participation in public affairs, of the very nature of the type of society in which Americans wished to live; eventually a consensus was reached, which culminated in the Nineteenth Amendment no more than 45 years ago.

Similarly with property qualifications, it is only by fiat that it can be said, especially in the context of American history, that there can be no rational debate as to their advisability. Most of the early Colonies had them; many of the States have had them during much of their histories; [8] and, whether one agrees or not, arguments have been and still can be made in favor of them. For example, it is certainly a rational argument that payment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay $1.50 or thereabouts a year for the exercise of the franchise. It is also arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans through most of our his-

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sufficient to invalidate this $1.50 tax whether under the Fourteenth or Fifteenth Amendment.

[6] See generally Ogden, The Poll Tax in the South 2 (1958); 1 Thorpe, A Constitutional History of the American People, 1776–1850, at 92–98 (1898); Williamson, American Suffrage From Property to Democracy, 1760–1860, cc. 1–4 (1960).

[7] See Porter, Suffrage in the United States 77–111 (1918); Thorpe, *op. cit. supra*, at 97, 401; Williamson, *op. cit. supra*, at 138–181.

[8] See generally Ogden, *op. cit. supra*; Porter, *op. cit. supra*.

tory, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens.[9] Nondiscriminatory and fairly applied literacy tests, upheld by this Court in *Lassiter* v. *Northampton Education Board*, 360 U. S. 45, find justification on very similar grounds.

These viewpoints, to be sure, ring hollow on most contemporary ears. Their lack of acceptance today is evidenced by the fact that nearly all of the States, left to their own devices, have eliminated property or poll-tax qualifications; by the cognate fact that Congress and three-quarters of the States quickly ratified the Twenty-Fourth Amendment; and by the fact that rules such as the "pauper exclusion" in Virginia law, Va. Const., § 23, Va. Code § 24–18, have never been enforced.[10]

Property and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a

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[9] At the Constitutional Convention, for example, there was some sentiment to prescribe a freehold qualification for federal elections under Art. IV, § 1. The proposed amendment was defeated, in part because it was thought suffrage qualifications were best left to the States. See II Records of the Federal Convention 201–210 (Farrand ed. 1911). Madison's views were expressed as follows: "Whether the Constitutional qualification ought to be a freehold, would with him depend much on the probable reception such a change would meet with in States where the right was now exercised by every description of people. In several of the States a freehold was now the qualification. Viewing the subject in its merits alone, the freeholders of the Country would be the safest depositories of Republican liberty." *Id.*, at 203. See also Aristotle, Politics, Bks. III, IV; Tocqueville, I Democracy in America, c. xiii, at 199–202 (Knopf ed. 1948).

[10] See *Harper* v. *Virginia State Board of Elections*, 240 F. Supp. 270, 271.

modern democracy should be organized. It is of course entirely fitting that legislatures should modify the law to reflect such changes in popular attitudes. However, it is all wrong, in my view, for the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process. It was not too long ago that Mr. Justice Holmes felt impelled to remind the Court that the Due Process Clause of the Fourteenth Amendment does not enact the *laissez-faire* theory of society, *Lochner* v. *New York*, 198 U. S. 45, 75–76. The times have changed, and perhaps it is appropriate to observe that neither does the Equal Protection Clause of that Amendment rigidly impose upon America an ideology of unrestrained egalitarianism.[11]

I would affirm the decision of the District Court.

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[11] Justice Holmes' admonition is particularly appropriate: "Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." 198 U. S., at 75–76.